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THE
MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED
ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,

OF THE COLORADO BAR,

VOL. XII.

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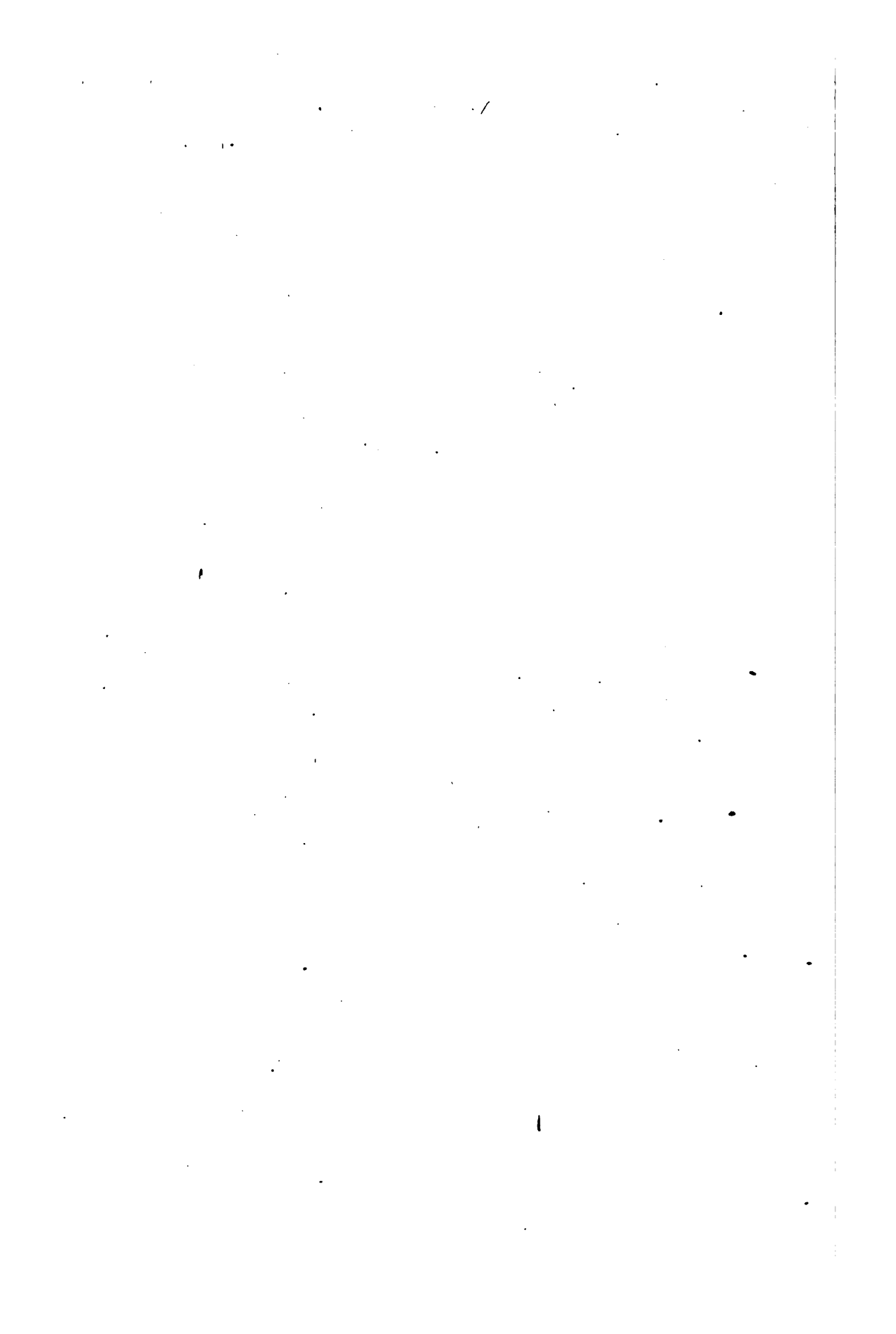


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MINING REPORTS.

VOL. XII.

¹ MOSS V. OAKLEY.

(2 Hill, 265. Supreme Court of New York, 1842.)

² **Power of corporation to make note.** A corporation (mining) may make a promissory note for a debt contracted in the course of its legitimate business, although not specially authorized by its charter to contract in that form.

³ **What stockholders liable for deb'ts.** Where the charter of a mining company declared the stockholder personally liable for the payment of all debts or demands against the company: *held*, that a suit to assert such personal liability could be maintained only against such as were stockholders when the debt was contracted.

Presumption that note was coeval with debt. In a suit brought against a stockholder after judgment recovered upon a promissory note given by the company, the note will be presumed to have been made when the debt was contracted until the contrary be shown.

⁴ **Presumptions after judgment.** The judgment against the company is at least *prima facie* evidence of the validity of the note, under such circumstances; and *quære*, whether the defendant will be allowed to impeach either note or judgment on any other ground save that of fraud.

Debt against the defendant, as one of the stockholders of the Rossie Lead Mining Company, on the ground that the defendant, as a stockholder, was personally liable for the payments of all the debts of the company: Statutes of 1837, p. 441, Chap. 396. By the first section of the act creating the company, certain persons who are named, and all others who then were, or who might thereafter become, interested in the capi-

¹ See note, 1 M. R. 295.

² *In re Great Western Co.*, 5 Biss. 363.

³ *State v. Cox*, 88 Ind. 254.

⁴ *Hampson v. Ware*, 4 Iowa, 13; see *Chase v. Curtis*, 113 U. S. 452.

tal stock, were constituted a body corporate. By the 7th section, the stock was declared to be personal property, and was made transferable on the books of the corporation. The 9th and 10th sections are as follows: § 9. "The stockholders of said corporation shall be jointly and severally personally liable for the payment of all debts or demands contracted by the said corporation or their authorized agent or agents, and any person having any demand against the said corporation, may sue any stockholder, director or directors, in any court having cognizance thereof and recover the same with costs." § 10. "Before suit shall be commenced upon any demand under the preceding section of this act, judgment shall have been obtained against said corporation upon such demand, and execution issued thereon and returned unsatisfied in whole or in part, or the said corporation shall have been dissolved." The declaration, after reciting a portion of the charter, alleged that the company on the 30th October, 1839, at, etc., made their promissory note in writing, and thereby promised, *six months after date*, to pay to the order of Moss & Knapp, \$2,248.11, at the Ogdensburgh bank, for value received, and that M. & K. on the same day indorsed and delivered the note to the plaintiff. By means, etc. It was then alleged that the company did not pay, and that the plaintiff thereupon sued the company in this court on the note, and in July term, 1840, recovered judgment for \$2,224.10; that a *fi. fa.* was issued on the judgment, on which the sheriff made \$740; and as to the residue, he returned that the company had neither goods nor lands whereof the money could be made. It was then averred that the defendant was one of the stockholders of the company *at the time the note was made*. By means whereof an action hath accrued to the plaintiff, etc. Demurrer and joinder.

N. HILL, Jr., for the defendant.

H. SPENCER, for the plaintiff.

By the Court, BRONSON, J.

This company was created "for the purpose of raising and smelting lead ore, or galena," and it has the same general powers as other corporations: Statutes of 1837, p. 441, § 1, 8. A corporation, although not specially authorized to con-

tract in that form, may make a promissory note for a debt contracted in the course of its legitimate business: *Mott v. Hicks*, 1 Cow. 513; *Barker v. Mechanic Ins. Co.*, 3 Wend. 94. (The same doctrine has been recently held by the chancellor in *Att'y Gen. v. Ins. Co.*,¹ MS., March 15, 1842.) As against the company, the judgment is conclusive evidence that the note was valid; and although the defendant was not directly a party, yet, as a stockholder he was not altogether a stranger to the judgment. As against him, I think the declaration makes out a *prima facie* case of indebtedness by the company: *Slee v. Bloom*, 20 John. R. 669. Whether he is at liberty to impeach either the note or the judgment on any other ground than that of fraud, is a question which we are not now called upon to decide.

In the absence of any suggestion to the contrary, it is but reasonable to presume that the debt was contracted at the time the note was made; and then the averment in the declaration is, in substance, that the defendant was a stockholder at the time the debt was contracted. As such stockholder, the plaintiff insists that the defendant is liable; while on the other side it is contended that the statute only charges those who are stockholders at the time the suit is commenced. The plaintiff has brought his case within the tenth section of the statute, and the only question is upon the ninth. I think it was the intention of the law makers to charge those persons who were stockholders at the time the debt was contracted, and not those who became stockholders at any subsequent period. Such is the most natural and obvious meaning of the language. If we omit those words which do not affect the present inquiry, the first branch of the section will read as follows: The stockholders shall be personally liable for all debts contracted by the corporation. Stockholders are here mentioned in connection with the contracting of the debt; and the legislature seems to have had in mind such persons as were then members of the company, and not such as might become members at a future period. The remaining branch of the section does not necessarily lead to a different conclusion: Any person having any demand against the corporation, may sue any stockholder and recover the same. The

¹ 9 Paige, 470.

stockholder mentioned here, is such an one as had been before declared personally liable, to wit, a stockholder at the time the debt was contracted.

I do not intend, however, to lay much stress upon the particular wording of the section, for it must be admitted that the statute may be so construed, without doing any violence to the language, as to make it apply to those persons who are stockholders at the time the suit is commenced. But if we look at the nature of the case and the general scope of the act, it will go far to confirm that interpretation which fixes the personal liability upon those who were stockholders at the time the debt was contracted. Certain persons who are about to engage in the hazardous business of mining, apply to the legislature for an act of incorporation; and the response is, we will give you and your associates a corporate capacity for the purpose of facilitating the transaction of business, but it must be without the usual exemption of the stockholders from personal liability for the debts of the company. If the corporation, in whose name the business will be transacted, contract debts, you must be personally liable for the payment of those debts in the same manner as though you had gone on with the business as a voluntary association or partnership. And as there may be a great number of associates, and creditors may be embarrassed in bringing their actions, we will make the case in one respect more onerous than a common partnership, by allowing the creditor to sue any one, as well as all of the stockholders—"the stockholders shall be jointly and *severally* personally liable." Upon this construction the statute will, I think, best answer the end which the legislature had in view. In *Allen v. Swall*, 2 Wend. 327, the words of the statute were that "the members of the company shall be liable individually;" and Savage, Ch. J., said, "it was the intention of the legislature to put the defendants [stockholders] upon the same footing as to liability *as if they had not been incorporated*. Individual liability in the act must be understood in contradistinction to corporate liability; and the defendants must therefore be held responsible *to the same extent* and in the same manner *as if there was no act of incorporation*." Judgment was rendered in accordance with the opinion of the chief justice; and although that judgment was afterward reversed (6 Wend. 325), it was upon a ground.

which did not touch the doctrine we have been considering.

If the stockholders may be charged as partners, or what is the same thing, as though there was no act of incorporation, it follows, of course, that those and those only are liable who were members of the company at the time the debt was contracted. The construction which charges them is the one best calculated to render exact justice to both parties. A man who purchases stock and comes into a corporation after it has been engaged in business, may often be deceived in relation to the number and magnitude of its debts. But while he is a stockholder he can know something about the extent of obligation contracted by the company, and is not wholly without the means of exerting an influence over those who manage its concerns. And as to those who may deal with the corporation, they bestow their labor, or part with their property on the credit of those who are known to be stockholders; and it may be ruinous to the creditor to turn him over to a remedy against persons with whom he did not deal, and who have come into the corporation at a subsequent period. It is true that a member who makes a fraudulent transfer of his shares for the purpose of avoiding his liability, may still be treated as a stockholder: *Marcy v. Clark*, 17 Mass. R. 330. But the burden of showing the fraud lies on the creditor; and he will find that no easy task at the present day, when all our sympathies are expended upon the debtor, and those who kindly aid him to live above the law. And besides, shares may be transferred, without fraud, to persons who are much less able to respond to creditors than were those who owned the stock at the time the debt was contracted.

The case of *The Middletown Bank v. Magill*, 5 Conn. R. 28, seems not to be in accordance with the decision of the same court in *Southmayd v. Russ*, 3 Id. 54; and see *Deming v. Bull*, 10 Id. 409. In the principal case the judges were divided nearly equally in opinion; and should the court finally adhere to that decision it is perhaps enough to say that a different view of the question has been taken in this State. In *Bond v. Appleton*, 8 Mass. Rep. 472, the plaintiff was the holder of the bills of the Hillsborough bank, and the defendant was sued as a stockholder; but he had ceased to be a stockholder more than a year before the plaintiff became a cred-

itor of the bank. The court held that the defendant was not liable; and that such persons only were liable as were stockholders at the time payment of the bills was refused by the bank. The case proves nothing in favor of the defendant. *Child v. Coffin*, 17 Mass. R. 64, does not touch the point now under consideration.

Judgment for plaintiff.

MOKELUMNE HILL CANAL AND MINING CO. v.
WOODBURY.

(14 California, 265. Supreme Court, 1859.)

Personal liability of corporators. In California each member of an incorporated company is answerable, personally, for his proportion of the debts and liabilities of the company.

¹ **Idem—Nature of liability.** Each corporator is a principal debtor, and not a mere surety for the corporation, and, in relation to the creditors of the corporation, stands on the same footing as if it were an ordinary partnership.

Interested witness—Stock sold after suit brought. One who sells out his shares in an incorporated company after suit is commenced against the corporation, can not testify on behalf of the company, because of his liability for costs; but his competency could be restored by the payment of the costs in addition to the transfer of his stock.

Appeal from the Fifth District.

Plaintiff had judgment below. Defendant appeals.

ROBINSON, BEATTY & HEACOCK, for appellant.

HEYDENFELDT, for respondent.

COPE, J., delivered the opinion of the court, BALDWIN, J., and FIELD, C. J., concurring.

This is a suit by a corporation to recover damages for the diversion of water from a certain ditch or canal, belonging to the plaintiff. On the trial of the case, one of the witnesses

¹ *Young v. Rosenbaum*, 39 Cal. 646; *Moss v. Averell*, 10 N. Y. 449.

examined on behalf of the plaintiff, stated on his *voir dire*, that he owned at the commencement of the suit a number of shares of the *stock* of the corporation, but had sold and transferred the same soon after the suit was commenced. The competency of this witness is the only question necessary to be considered. The objection to his competency is based upon the ground of his liability for costs.

- Under the constitution and laws of this State, each member of a private incorporated company is answerable personally for his proportion of the debts and liabilities of the company. It was decided by this court, in the case of *McAuley v. York M. Co.*, 6 Cal. 80, that certain witnesses, who were members of the corporation when the liability was incurred upon which the suit was brought, were incompetent to testify in its behalf, because of their interest. That case is directly in point as determining the effect of the liability upon the competency of the witness, if, in fact, any liability existed at the time of his examination, and the question is, therefore, whether at that time he was legally bound for any portion of the costs of the suit.

It would seem, from a just and reasonable construction of the constitutional and statutory provisions upon this subject, that an individual corporator, in respect to his personal liability for the debts of the corporation, does not occupy the position of a surety, but that of a principal debtor. His responsibility commences with that of the corporation, and continues during the existence of the indebtedness. It is not in any sense contingent, but is declared to be absolute and unconditional. The remedial effect of these provisions, in which consists their only value, should not be impaired by construction. Similar provisions in other States have generally been construed in the same manner. It has frequently been decided that the members of a corporation, who are answerable personally for the corporate debts and liabilities, stand in the same position, in relation to the creditors of the corporation, as if they were conducting their business as a common partnership. In *Allen v. Sewall*, 2 Wend. 327, the words of the statute were, that "the members of the company shall be liable individually," and it was held that they were placed "upon the same footing as to liability, as if they had not been

incorporated." The court said: "*Individual* liability in the act must be understood, in contradistinction to *corporate* liability; and the defendants must, therefore, be held responsible to the same extent, and in the same manner, as if there was no act of incorporation." The same doctrine was afterward affirmed in *Moss v. Oakley*, 2 Hill, 265, in which case it was held that a provision in the act of incorporation, making it necessary to obtain a judgment against the corporation before proceeding to enforce the personal liability of its members, did not prevent such liability from attaching and becoming perfect at the moment of the accruing of the demand against the corporation. In *Harger v. McCullough*, 2 Denio, 119, one of the questions was, whether stockholders, who were personally liable for the debts of the corporation, were to be regarded as principal debtors, or as sureties for the corporation; and it was held that they were principal debtors. Chief Justice Bronson, in delivering the opinion of the court, said: "I think the stockholders, in their individual, as well as their corporate capacity, are principal debtors. Although they have been incorporated with many of the privileges usually granted to men associated in that form, yet the privilege of exemption from personal liability for the debts of the company, has been denied to them, and their personal liability has been expressly declared. They are thus placed, in relation to the creditors of the company, upon the same footing as though they were an unincorporated association or partnership." In *Marcy v. Clark*, 17 Mass. 330, the Supreme Court of Massachusetts, in speaking of a statute of that State, making the members of incorporated companies personally liable for the debts of the company, declared its effects to be, in respect to the rights and remedies of creditors, to continue in operation the principle of partnership.

This view of the nature of the personal liability imposed upon the members of a corporation, is conclusive of the present question. It will hardly be disputed, that the corporation itself, being the plaintiff in the case, incurred at the commencement of the proceeding a liability for the costs, not alone to the officers of the court for their services, but also to the defendant for his disbursements in case of a failure to recover. From this liability, extending to the entire costs of

the case, the corporation could not possibly escape. The witness, to the extent of his proportion of the costs, stood in the same position as the corporation, and could not in any manner avoid the legal consequences of his liability. The fact that his liability depended upon that of the corporation, made no difference. It involved a direct individual responsibility from which the transfer of his stock did not relieve him. He was still in the situation of a person liable to contribute to the costs of the suit, and was therefore incompetent. His competency might have been restored, but the means resorted to for that purpose were insufficient. It was necessary to extinguish his interest, and to accomplish this, required, in addition to the transfer of his stock, the payment of the costs.

It is well settled, that the competency of the party in interest, who, though not a party to the record, is liable for the costs of the suit, can be restored only by an assignment of his interest and an unconditional payment of all the costs: *Ash v. Patton*, 3 Serg. & Rawle, 300; *Gilbert v. Shindle*, 15 Id. 236; *Scott v. Lloyd*, 12 Peters, 145. Actual payment is necessary; an agreement to pay, or conditional deposit of money for that purpose, will not be sufficient: *Clement v. Bixler*, 3 Watts, 248; *Campbell v. Galbreath*, 5 Watts, 423.

Our conclusion is that the witness was incompetent, and for that reason the judgment is reversed, and the cause remanded for a new trial.

Ordered accordingly.

HANDRAHAN V. CHESHIRE IRON WORKS.

(4 Allen 396. Supreme Court, Massachusetts, 1862.)

Merger of debt in judgment. In an action upon a judgment recovered against a corporation, R. was summoned as a stockholder. Upon the trial it appeared that R. was liable upon the original debt, but was not made a party in the original suit, and had ceased to be a stockholder at the time the judgment was obtained. *Held*, that the original debt was merged or extinguished by the judgment and a new debt created thereby, for which R. was not liable.

Contract upon a judgment recovered against a corporation. James N. Richmond was summoned as a stockholder, and the corporation being defaulted, the action proceeded against him alone. At the trial in the superior court, it appeared that Richmond was a stockholder of the company at the time when the original debt was contracted, but ceased to be so more than a year before the recovery of the judgment now declared on, and that he was not summoned as a stockholder in the action on which that judgment was rendered; and Rookwell, J., ruled that he could not be held liable in this action. The plaintiff alleged exceptions.

J. C. WOLCOTT, for the plaintiff.

H. L. DAWES and S. W. BOWERMAN, for the defendants.

BIGELOW, C. J.

The rule that a simple contract debt is merged or extinguished in the higher nature of the security or evidence of indebtedment furnished by a judgment of a court of record founded on such debt is well settled and has often been recognized and applied by this court. In *Sampson v. Clark*, 2 Cush. 173, it was held that a debt due from an insolvent, prior to the first publication of the notice of issuing a warrant against his estate was not provable, because the creditor had recovered a judgment upon it subsequently to such publication. The judgment was deemed to have created a new debt, in which the original cause of action had been merged. The same rule was applied in *Woodbury v. Perkins*, 5 Cush. 86, in which it was held that a discharge under the Bankrupt Act of the United States, St. of U. S. of 1841, c. 9, § 4, was no bar to an action on a judgment recovered after the filing of the petition for the benefit of the act on a debt which was due and owing from the bankrupt prior to that time. This decision affirmed the previous one in *Sampson v. Clark*, and was founded on the principle that the original debt had ceased to exist by being merged in the judgment. In *Bangs v. Watson*, 9 Gray, 211, the same principle was again recognized. It was there held that a debt originally contracted for necessities furnished to an insolvent was merged

in a judgment, and that the latter was barred by the discharge of the judgment debtor in insolvency. The general rule is that when a judgment has been obtained on a particular debt or demand, the contract or obligation from which such debt or demand arose is merged by the superiority of the security thus acquired. *Transit in rem judicatam*, and the creditor can no longer sue on the original promise or contract: *Siddall v. Rawcliffe*, 1 Cr. & M. 490; *Thompson v. Hewitt*, 6 Hill (N. Y.), 254. The application of this familiar principle to the case at bar is decisive against the right of the plaintiff to hold the party whom he has summoned as a stockholder liable for the judgment recovered against the corporation, which is set out in the declaration. Under the statutes of this commonwealth, no person can be held liable as a stockholder for the debt of a manufacturing corporation who did not hold stock therein when such debt was created, or at the time it fell due, and who has never subsequently been the owner of any shares therein. Now Richmond, the person summoned as stockholder in the present action, had ceased to be a member of the corporation more than a year prior to the rendition of the judgment declared on. He is not, therefore, chargeable in this action for the debt now due to the plaintiff. When the cause of action accrued, that is, at the time when the plaintiff recovered his judgment and acquired the right to bring an action of contract in the nature of debt thereon, Richmond had ceased to be a stockholder, nor has he subsequently held any stock in the corporation. Although he was liable on the original debt, having been a stockholder when it was contracted, that debt has become merged or extinguished by the judgment, and a new debt created thereby for which his property is not liable to be taken on execution.

This rule of a technical merger of a prior debt in a judgment may sometimes operate with hardship so as to defeat the apparent equitable rights of parties. But its application to the present case is not open to any such objection. The plaintiff, if he had seen fit to summon the stockholder whom he now seeks to charge, to answer in the original suit, might have obtained an execution on which the property of such stockholder would have been liable to be taken to satisfy the corporate debt, as long as the creditor deemed it expedient to keep the execution in force by regular renewals. This

certainly afforded him a complete and adequate remedy. But having omitted to make the stockholder a party to that suit, and having changed the nature and character of the corporate debt from a simple contract, which would have been barred in six years, to a judgment, the right of action on which continues for twenty years, he has no ground to complain that his remedy is unreasonably abridged, because he can not charge with this new debt the estate of a person who had ceased to be a stockholder when the judgment was rendered, and the present cause of action thereby accrued.

Exceptions overruled.

VAN ETEN V. EATON.

(19 Michigan, 187. Supreme Court, 1869.)

The incorporation laws a part of the charter—Implied notice of liability. The general act under which a company becomes incorporate and its articles of incorporation, taken together, constitute the charter of incorporation, the acceptance of which charges the corporation with knowledge of all the duties prescribed by the act, and of all consequent liabilities.

¹ **Neglect to make the report** required by sections 5, 18 or 19, or neglect to file it in any of the requisite places, will be presumed to be intentional, and such neglect unexplained renders each director liable for all debts of the corporation contracted during the period of such neglect.

Object in requiring reports. The object of the legislature in requiring the reports to be made and filed was to secure accessible means of information respecting the financial condition of the corporation, whenever it should be actually conducting its operations.

Error to Bay Circuit.

Eaton, the plaintiff below, recovered a judgment against the Chicago & Milwaukee Salt Company, a corporation organized under the laws of Michigan (*Comp. Laws, Chap. 63*), on which execution was issued and returned unsatisfied. He then brought this action against Van Eten, the defendant below, alleging that Van Eten was, and ever had been since its organization, a director of the corporation; that the directors of

¹ See *Bonnell v. Griswold*, 89 N. Y. 122; 80 Id. 128.

the said corporation had intentionally neglected to make the reports required by sections five and nineteen of the act, under which the corporation was organized; and that thereby the defendant (Van Etten) had become liable to him for the amount of his judgment and costs against the corporation.

From the articles of the corporation it appeared that the purpose for which it was formed was "for the manufacture of salt in the State of Michigan." Article six, specifying the place where its business should be carried on, is in these words: "The place in this State where the office for the transaction of business is located, is the city of East Saginaw, and their business is to be carried on in the counties of Saginaw and Bay, and the adjoining counties if necessary." Copies of the articles of association were duly filed in the office of the auditor general and in the office of the clerks of Saginaw and Bay counties.

On the trial evidence was offered that the company kept its office in Bay City, in Bay county; and that upon search in said office no report as required by section five of chapter sixty-three of the Compiled Laws could be found. The clerk of Bay county testified that he had made diligent search in his office, and had found no report, as required by sections five, eighteen and nineteen of chapter sixty-three of the Compiled Laws. No evidence was offered to show whether there was, or was not, any such report filed in the office of the auditor general or of the clerk of Saginaw county.

The circuit judge charged the jury that the neglect to file any of the reports required by the statute, must be presumed to be intentional, and that, if any of the reports required were not filed, the defendant would be liable in this action. The jury found for the plaintiff; and the judgment rendered on the verdict is brought into this court by writ of error.

THEO. C. GRIER, for plaintiff in error.

H. H. HATCH and S. M. GREEN, for defendant in error.

GRAVES, J.

Eaton brought assumpsit against Van Etten to recover a

demand against a manufacturing corporation organized under the act of February 5, 1853, and of which Van Etten was a stockholder and director. The action was supposed to be authorized by that portion of section twenty-three of the act, which provides that if the directors of any such company shall intentionally neglect or refuse to comply with the provisions, and to perform the duties required of them by sections three, five, eighteen and nineteen of the act, they shall be jointly and severally liable in an action founded on such statute for all the debts of such corporation contracted during the period of such neglect or refusal. And the liability of Van Etten was claimed to have arisen by reason of the failure of the directors of the company to report upon the condition of the company, as required by sections five and nineteen of the statute in question.

The assignments of error are quite numerous, but all of them which are now relied on, depend upon the construction to be given to the statutes, and do not require therefore to be separately noticed.

It appeared upon the trial that on the 21st of March, 1862, the plaintiff in error and two other persons, adopted articles of association and formed a corporation for the manufacture of salt, and that the articles stated that the place in this State where the office of the company for the transaction of business was located, was in the city of East Saginaw, and that their business was to be carried on in the counties of Saginaw and Bay, and the adjoining counties if necessary.

Evidence was also given to show that from the winter of 1864, the company had carried on business in Bay county and had kept an office there, and that neither of the reports required by sections five and nineteen could be found in the office of the clerk of Bay county, or in the office of the company in that county.

On the part of the defendant, evidence was given tending to show that he was not aware that any law of the State required the making and filing of any reports of the kind mentioned, and was ignorant of any such law; and did not know whether or not the reports had been filed; and had not intentionally neglected or refused to conform to the requirements of the statutes, and indeed had no knowledge of such requirements, and thought nothing about them.

Whether the reports in question had been filed in the office of the auditor general or in that of the clerk of Saginaw county did not appear, nor was it shown whether the company carried on business in the latter county, unless the statement in the articles of association that at their date the office of the company was there situated, should be considered as evidence of that fact.

First. The plaintiff in error maintained that the requirement in section 19 that the reports should be filed in the office of the clerk of the county in which the business of the corporation should be carried on, had reference only to the county in which was situated the office of the company mentioned in the articles of association pursuant to the provisions of section four, and therefore, as this office of the company was fixed by the articles of association in the county of Saginaw, the omission by the directors to file the report in question in the office of the clerk of Bay county was of no legal consequence whatever.

This construction is thought to be supported by the difference in phraseology discovered in sections 3, 4 and 19.

By section 3, before the corporation can commence business the articles of the association are required to be filed with the "county clerk of the county or counties" in which the corporation shall "conduct" its business; and by section 4 the corporation is required to state in the articles, "the place in this state where their office for the *transaction* of business is located and the *county* or *counties* in which their business is to be carried on;" but section 19 requires the report therein specified to be filed in the "office of the clerk of the county in which the business of any such corporation is carried on."

The plaintiff in error contends that this variation in phraseology marks the purpose of the legislature and shows that where an act was required to be done in more than one county, the phrase "county or counties" was used; while in directing anything to be done in but one county the expression employed was "the county."

It appears to us, however, that this difference in language was wholly accidental, and was never intended to point to the distinction now insisted on.

Section 4 distinguishes between the county in which the

business office may be situated, and other counties in which the corporation may carry on business, and thereby rejects the inference that the statute in referring to the county in which the business is carried on, must be taken as meaning the same county in which the office is located.

The legislature contemplated that the company office might be in one county and the business operations, aside from mere office work, entirely carried on in another county or counties more or less remote; and it is not wholly unworthy of notice that the only passage in the act which in terms alludes to the company office, speaks of it as the "office for the *transaction* of business," and not as the place where the corporation is to "carry on business" or "conduct the mining or manufacturing business."

It is therefore seen that the language of the act which refers to the company office implies that the business spoken of in connection with it, is such as could be "*transacted*" at the office, and not actual mining, or manufacturing, which could only be done elsewhere; and that while the language relating to the office and its business would exclude any operations consisting of the actual working of the mine or manufactory, the other portions of the act which speak of "carrying on" or "conducting" business are broad enough to include actual mining and manufacturing.

But, turning from this somewhat narrow view of the subject, it seems evident that a leading object of the legislature, in requiring the reports in question to be made and filed, was to secure accessible means of information to those having business with the company respecting the financial condition of the corporation wherever it should be actually conducting its manufacturing operations. And as its nominal business office might be separated from the place or places where its works should be fixed and its material operations carried on, by great distance and many serious obstacles to the communication, there was quite as much reason for requiring the report mentioned in section 19 to be filed with the clerk of the county in which the manufacturing should be done, as in that of the county in which the office for "transacting" business should be situated, if a different one; and upon consideration we think that the legislature intended, by the section

last cited, to require the report there specified to be filed in the office of the clerk of every county in which the material business of manufacturing should be done.

Second. It was further objected that as § 23 only fixes the personal liability of the directors when they "intentionally neglect or refuse to comply with the provisions and to perform the duties required of them by sections 3, 5, 18 and 19," their liability can not arise unless the duties imposed by each and all of those sections shall have been intentionally neglected. This position is plainly untenable.

Section eighteen is expressly applicable and only applicable to mining corporations, and the directors of a manufacturing corporation can commit no fault by non-action under it, since its provisions impose no duty on the officers of such a corporation.

The provision referred to in § 23 must be taken distributively, and be applied according to the nature of the corporation involved in the duty required.

Third. It was also urged by the plaintiff in error that it was necessary for Eaton to show that the neglect imputed to the directors was intentional, and that whatever inference as to intention might properly be drawn from the bare omission to report, the jury were not bound to consider it as sufficient evidence of an intention to neglect the duty in question, although no explanation of the cause or reason of the failure was submitted.

If the plaintiff should be required in the first instance to prove by direct evidence the actual intent in the minds of the delinquent directors, and should be precluded from making proof by inference from the fact of omission to perform the act required by the statute, the object of the law would be seriously obstructed, if not in many cases altogether defeated.

The directors might at their pleasure neglect to report, and by a careful abstinence from any overt act or word to mark their design, make their liability depend upon their own testimony, and a resort to that, by one seeking to fix a liability upon them, might be made difficult and sometimes impossible by accident or contrivance.

It is hardly credible that the legislature could have intended

to fetter so beneficial a provision as that in question, in the manner now contended for.

The organic act under which the corporation was formed, together with the articles of association, are to be considered as the charter of the company, and they are in the nature of a grant from the State to the corporators expressing the rights and privileges conferred and the conditions annexed to them; and the deliberate acceptance of this grant, with the rights and privileges involved in it, is conclusive evidence in the civil proceeding authorized by § 23 of knowledge in the grantees or corporators of all those conditions.

The plaintiff in error and his associate corporators must therefore be considered as having been acquainted with the requirement to make and file reports of the condition of the company; and we think that in view of this circumstance, and in the absence of all explanation or countervailing proof, the omission by the directors to file the report in the office of the clerk of Bay county, was sufficient evidence to require the jury to find that the neglect was intended, and that the circuit judge was warranted in directing the jury accordingly.

Fourth. It was finally insisted that Van Etten could be made answerable only in consequence of his own intentional neglect as a director, and not by reason of the neglect of his co-directors, who constituted a majority of the board, and this position was supposed to be supported by the language of § 23 itself.

This view, however, can not be maintained. A *majority* of the directors are required to make the report specified in § 19, while § 23 *expressly authorizes* an action against *all* the directors jointly in case of an intentional neglect to make it, and this, notwithstanding the minority of the board may have been ready to comply, while the controlling majority involved the whole in disobedience.

It will be observed, likewise, that the passage in the last named section, which makes the neglect to report a misdemeanor, expressly confirms the criminality to such of the directors as were "*present and acting*" at any time during the neglect. This denotes that the legislature were of opinion that a director would be exposed to the civil remedy, although he had never been present and acting, since the only difference in the cir-

cumstances as stated in the section, to authorize a civil or criminal proceeding, is caused by the restrictive paragraph just cited.

These considerations are deemed sufficient to show that the legislature intended that a director guilty of no personal neglect might be made liable for the debts of the corporation, in case a majority of the directors should intentionally neglect to report as required, and hence it is not thought necessary or expedient to extend this opinion by pursuing the question further.

Whether under the circumstances of this case the omission to put any report on the files of the company office in Bay county was attended by any legal consequence, need not be determined, since the neglect, which was clearly established, to file it in the office of the clerk of that county was, of itself, sufficient. It will also be observed, in this connection, that in 1867 and in 1869 the legislature so amended section five, in respect to the report there specified, as to make it subject to an interpretation quite different from that which it called for before. Laws 1867, p. 126 ; Laws 1869, p. 116.

The positions taken by the plaintiff in error have been examined, and it appears to us that they fail to show any error committed by the court below, and we think the judgment should be affirmed with costs.

The other justices concurred.

UNION IRON CO. v. PIERCE ET AL.

(4 Bissell, 327. U. S. Circuit Court, District of Indiana, 1869.)

¹ **Debt will lie upon a penal statute.** It lies whenever the obligation is to pay a sum certain, or which may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record or statute.

Individual liability of corporators. When the charter of a corporation provides that where its officers shall neglect to make and publish certain reports required, they shall be individually liable for all corporation debts contracted while they are officers or stockholders, and when, while they were such, they were guilty of such neglect, and in

¹ *Kirk v. Hartman*, 11 M. R. 451.

the meantime the corporation became indebted to the plaintiff by note, *held*, that he might maintain an action of debt therefor against such delinquent officers.

Reports of officers. Where the charter of a corporation required its officers annually, between the 1st and 20th of January, to make and publish a certain report, *held*, that a company incorporated in May, 1867, was bound to make and publish such report in the following January.

Declaratory laws, as such, are unconstitutional. They may operate as future rules on subsequent transactions; but, as constructions of prior law, they are utterly void. The State legislature has no power to construe a statute previously enacted—such construction, as to acts done, is solely for the judiciary.

Repugnant statutes. When two statutes of different dates are repugnant, the latter repeals the former to the extent of such repugnancy.

Repeal—Effect on pending suits. Actions on statutes in their nature penal pending at the time of the repeal of such statutes, can not be further prosecuted after such repeal.

McDONALD, J.

This is an action of debt. A general demurrer is filed to the declaration, and whether the demurrer ought to be sustained is the question to be decided.

The declaration sets up a claim under an "individual liability" clause of the Indiana statute for the incorporation of manufacturing and mining companies: *Gavin & Hord*, 425. The 13th section of that act provides that every company incorporated under it "shall annually, within twenty days from the first day of January," make and publish a report in a newspaper of the county where the company is established, of the amount of its capital stock, debts, etc. And the 15th section of the act provides that for any failure to make and publish the report required by the 13th section, all the officers of the company "shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof."

The declaration alleges that under said act divers persons, among whom were some of the defendants, associated together, and on the 22d of May, 1867, became a corporation by the name of The White River Iron Company, and that the association fixed the number of directors at seven, and elected a board of directors accordingly, and chose therefrom a president and secretary. The declaration also avers that it was the

duty of the officers of the corporation, within twenty days from the 1st of January, 1868, to make and publish a report of the condition of the company, as prescribed by said 15th section of the act under which they were incorporated, and that they wholly neglected and failed to make and publish such report. It is further alleged in the declaration that on a note dated November 17, 1868, executed by said White River Iron Company to the plaintiff for three thousand six hundred and fifty dollars, payable one day after date, in an action pending in the Court of Common Pleas of Marion County, Indiana, the plaintiff, on the third day of February, 1869, recovered against said White River Iron Company a judgment for three thousand six hundred and ninety-six dollars and eighty-four cents, with costs, which judgment remains unsatisfied; and that by reason of the premises an action has accrued to the plaintiff to recover of the defendants the amount of said judgment.

In support of the demurrer, it is contended that the action of debt will not lie on the provisions of the statute above cited under any circumstances; and that as the action has been misconceived the demurrer must be sustained. In support of this view it is said that this is a penal statute, and the action it gives is consequently an action in form *ex delicto*. We do not understand that this consequence follows. We shall hereafter have occasion to inquire whether this is, in the technical sense, a penal statute. We think, however, whether it is such or not can not settle the form of action to be adopted, for though it be regarded as a penal statute, this circumstance does not tend to prove that debt will not lie on the claim stated in the declaration. The action of debt lies in many cases on penal statutes. At common law, debt is a very extensive remedy. It lies on simple contracts and on specialties for the payment of money. It lies on judgments for money and on legal liabilities; and it lies for penalties and other liabilities created by statute, requiring the payment of money, when the statute declares no other remedy, and where the amount of the liability is certain or may be readily rendered certain: 1 Chitty on Pleading, 110, 111, 112. And we may lay it down as a general rule, that whenever the obligation is to pay a sum of money which, as to amount, is certain, or may be

readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record or statute, the action of debt is a proper form of remedy.

But the defendants' counsel urge, that by the thirteenth section of the act in question the White River Iron Company were not bound to make and publish their report in January, 1868, as alleged in the declaration, because it had not been a corporation for one whole year. They construe that section to require this only after the first year of the existence of the corporation. The language is that the officers "shall annually, within twenty days from the first day of January, make a report," etc. The word "annually" means every year. And the meaning undoubtedly is, that when a company becomes incorporated under this act, it must, whenever a January comes after such incorporation has been organized, make and publish the report in question. The case of *Garrison v. Howe*, 17 New York, 458, is exactly in point on this question, and settles it against the demurrer.

But the Indiana legislature, in April, 1869, and after this suit was commenced, passed an act amendatory of said thirteenth section. And that amendment declares "That the word 'annually,' as used in section thirteen of said act, shall be construed to mean once a year after such company has been doing business at least twelve months." And it is urged that this legislative construction must govern us. There can be no doubt that the legislature intended, in passing this amendment, to assume the power to construe the thirteenth section of the act proposed to be amended, and it is equally certain that the Indiana legislature can exercise no such power. The constitution of this State separates the powers of the State government into three departments—the legislative, the executive, and the judicial—and it prohibits each of these departments from exercising the powers conferred on either of the others. Now, to make a law is a legislative function, which no court can assume; and the construction of a law already made is a judicial act, which no legislature can constitutionally perform. The amendment in question is a judicial act in so far as it attempts to declare the meaning of the term "annually" as it occurs in the thirteenth section of the old act. This amendment may operate as a future rule on subsequent transactions; but it can not operate

retrospectively and on past events. It is a well established rule of American jurisprudence that all declaratory laws, as such, are unconstitutional.

But the first section of the act of April, 1869, is not declaratory. It provides that the fifteenth section of the act for the incorporation of manufacturing and mining companies shall "be amended to read as follows, to wit: If any certificate or report made, or public notice given, by the officers of any such company, as required by this act, shall be false in any material representation; or if they shall fail to give such notice or make such report, and any person or persons shall be misled or deceived by such false report or certificate, or on account of such failure to make such report, and damaged thereby, then all the officers who shall sign the same, knowing it to be false, or fail to give the notice or make reports as aforesaid, shall be jointly and severally liable for all damages resulting from such failure on their part while they are stockholders in such company."

This act was passed and took effect April 30, 1869. The present suit was commenced April 23, 1869.

Under these circumstances, the defendants contend that the first section of the amendatory act, above cited, repeals the statute on which this action is founded, and takes away the right of action which the plaintiff had at the time of the commencement of this suit. Two questions arise on this point, namely: 1. Does the first section of the act of April 30, 1869, repeal those provisions in the act of which it is amendatory which gave the right of action on the facts stated in the declaration? 2. If so, does the repeal defeat this action? We will examine these questions separately.

1. As to the repeal. We have already seen that the 15th section of the original act for the incorporation of manufacturing and mining companies provides, that if the officers of any such company shall fail to make the report or give the notice required by the 13th section of that act, all the officers so failing shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof. We have copied above the first section of the act of April 30, 1869, which it is insisted repeals said provision of the 15th section of the original act, and on

which the present action is founded. It is certain that said first section and said fifteenth section are utterly inconsistent. Each gives a different remedy; and the first section gives no remedy in the case made by the declaration. There is, then, such a repugnancy between the two that they can not both stand. The amendatory act, indeed, contains no repealing clause. But that is undécisive of the point in question. It is too well settled to require the citation of authorities that when there are two repugnant statutes of different dates, the latter repeals the former to the extent of the repugnancy. From the nature of the case, this must be so in all systems of jurisprudence. With us this rule has been so long and so well established that it has taken the form of a maxim—*Leges posteriores priores contrarius abrogant*. I conclude, therefore, that the act of April 30, 1869, repeals the 15th section of the original act for the incorporation of manufacturing and mining companies, so far as the latter gives an action merely for a failure to report and publish a statement of the condition of the company.

2. As the amendatory act repeals the law on which the plaintiff's claim is founded, does it destroy the right of action which that law gave.

It is well sett'ed that the repeal of a penal statute defeats all actions for penalties under such statute pending at the time of the repeal, unless the repealing act, in terms, saves the right to prosecute pending suits: *Hunt v. Jennings*, 5 Blackford, 195; *Yeaton v. U. S.*, 5 Cranch, 281; *Stephenson v. Doe*, 8 Blackford, 509; *Butler v. Palmer*, 1 Hill (N. Y.), 324. A learned English writer says that "when an act of parliament is repealed, it must be considered—except as to those transactions passed—closed, as if it never existed:" Dwarria on Statutes (Potter's Ed.), 160.

The following rules, taken from Smith on Statutes and Constitutional Law, pp. 895, 896, appear to me to be sound: 1. If the right acquired under a statute be in the nature of a contract or a grant of power, a repeal will not divest the interest acquired, or annul acts done under it. 2. If the legislature, *ex mero motu*, by a statute give a party property belonging to the State, the gift is not defeated by a repeal of the statute. 3. If a penal statute be repealed after an act done in violation

of it, the violator is not subject to punishment under it after the repeal. 4. The repeal of a statute made in restraint of natural rights or the use of property, restores the privileges thus restrained. 5. Where a statute gives a right in its nature not vested but remaining executory, if it does not become executed before a repeal of the law, it falls with it, and can not thereafter be enforced. An eminent English judge says: "The effect of a repealing statute I take to be to obliterate the statute repealed as completely as if it had never passed; and that it must be considered as a law that never existed, except for the purposes of those actions which were commenced, prosecuted and concluded while it was an existing law." *Keys v. Goodwin*, 4 Moore & Payne, 341.

In view of these authorities, I think the question resolves itself into this: At the time of the commencement of this action, had the plaintiff such a vested right of recovery upon the facts stated in the declaration, as the legislature has not power to destroy?

What, in the legal sense, is a vested right, it is not easy to define. Perhaps as good a definition as can be given is, that it is a fixed, established right, not liable to be defeated by any contingency. A fair construction of the act of April 30, 1869, requires us to conclude that the legislature intended to destroy the plaintiff's right of action in the case at bar. And the only point is, had the legislature the power to destroy it? If the defendant's liability arose out of a contract, the constitution would protect the plaintiff's right against all legislation; and so the right would be a vested right. But the act on which the plaintiff's claim is founded is not in the nature of a contract; it is a statute highly penal. A New York statute contained a provision in the very words of the 15th section of the Indiana act for the incorporation of manufacturing and mining companies; and the court of appeals of that State held that statute not "simply a remedial one," but that the provision was "highly penal:" *Garrison v. Howe*, 17 New York, 458. In an action brought for a penalty under the Fugitive Slave Law, it was held that "as the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And, as the plaintiff had no vested right in the penalty, the legisla-

ture might discharge the defendant by repealing the law: *Norris v. Crocker*, 13 Howard, 429. May we not, in the case at bar, with equal reason say that, as here, too, the plaintiff's right to recover depended entirely on the statute, its repeal destroyed that right, and if in that case it was not a vested right, how could it be so in this? The case of *The State v. Youmans*, 5 Indiana, 280, is very much in point on this question. There, the act of 1843 had provided that if any sheriff should "neglect or refuse to return any writ of execution to the court to which the same was returnable, on or before the return day thereof, he should be amerced to the amount, with interest and costs, due on such execution." Pending an action on this statute, it was repealed. The court held that the repeal destroyed the right of action, and said: "The act of 1843 clearly imposed on the sheriff a penalty. * * * * It is true that if a party on a prior statute has acquired a vested interest, its subsequent repeal would not affect his rights. But that principle is not applicable to the case at bar; because in a penalty there can be no vested right until it has been reduced to a judgment. A mere penalty never vests, but remains executory."

These authorities seem to me to be decisive of the question under consideration.

But, on the part of the plaintiff, it is insisted that the Indiana legislature could not constitutionally pass the repealing act in question; because the constitution of Indiana declares that "dues from corporations other than banking shall be secured by such individual liability of the corporators, or other means as may be prescribed by law."

This provision of the constitution evidently requires legislation on the subject to which it relates. And it requires such legislation as may fairly tend to secure dues owed by corporations. But it clearly vests a wide discretion in the legislature. It says that dues from these corporations shall be secured by such individual liability of corporators, or other means, as may be prescribed by law. If the legislature should adopt the policy of making the corporators personally liable, it leaves the legislature free to provide for enforcing that liability in any manner that may be thought best, and of course to alter the manner and extent of that liability at pleasure. But it does

not require the legislature to adopt the individual liability policy. It only requires the adoption of that policy or such "other means" as may secure the corporation debts. The legislature, therefore, is not absolutely bound to adopt any individual liability law; and it would seem to follow that if it is adopted, it may at any time be altered or repealed.¹

Demurrer sustained.

BYERS V. FRANKLIN COAL CO. OF LYKENS VALLEY
ET AL.

(106 Massachusetts, 131. Supreme Court, 1870.)

A mining corporation is not a manufacturing corporation, within the statute of 1862, chapter 218, defining and regulating the enforcement of the liabilities of officers and stockholders of manufacturing corporations.

² Liability enforced in equity. By statute, a creditor of a mining corporation may maintain a bill in equity against the officers of the corporation who are liable for its debts.

Acceptance of draft for accommodation. A debt due from a corporation to one who has accepted the company draft for its accommodation, and who paid it at maturity, is a debt contracted at the time of acceptance.

Merger of debt in judgment. The fact that a creditor has taken judgment against a corporation does not preclude him from enforcing the liability of the officers of the corporation for the original debt by a bill in equity. The debt is not so merged in the judgment as to extinguish their liability under the statute.

Bill in equity amended after trial. Upon a bill in equity to enforce the personal liability of the officers of the corporation, upon company drafts accepted by the plaintiff for the accommodation of the company and paid by him at maturity, the plaintiff, after the trial, moved to amend so as to include in his pleadings a draft not therein mentioned: *Held*,

¹ By act of Congress, February 25, 1871, (16 U. S. Statutes at Large, 432,) it is provided, "That the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."—[*Bissell*, Reporter.]

² Compare *Morley v. Thayer*, 3 Fed. 737; *Pollard v. Bailey*, 20 Wall. 527; *Stone v. Chisolm*, 113 U. S. 302.

that as the case had been tried as if the allegation offered by way of amendment had been contained in the original bill, the motion would be allowed.

Contract of indemnity for accepting drafts—Defense. In an action against the officers of the corporation by one who has accepted and paid drafts under a contract that the corporation would indemnify him, it is no defense that the drafts were not those of the corporation but of one Cook, its treasurer.

Bill in equity, filed September 5, 1867, by Eby Byers, in behalf of himself and all other creditors of the Franklin Coal Company of Lykens Valley, a corporation organized and established in Boston, under the general statutes, chapter 61, against said corporation, and Edward C. Bates, Josiah Caldwell, Charles H. H. Cook, George S. Hillard, George C. Lord, Theodore Matchett, Jacob Sleeper and Joseph M. Wightman, to charge the individual defendants, Bates as president, Cook as treasurer, and the others, with Bates, as directors of the corporation, chosen at the annual meeting, June 20, 1865, and holding said offices from that time till on or about June 26, 1866, with personal liability for a debt of the corporation to the defendant, by reason of their neglect to sign and swear to and deposit with the city clerk of Boston, within thirty days after the date of said meeting, the certificate of the financial condition of the corporation required by the statute of 1862, Chap. 210.

The debt alleged was the amount of a judgment for \$5,705.40 damages and \$21.71 costs, obtained by the plaintiff at April term, 1867, of the superior court in Suffolk, in an action brought by him against the corporation "upon a draft of said corporation, payable in six months from its date, which date was April 3, 1866, for the sum of \$5,500 which draft this plaintiff had indorsed for the benefit and accommodation of said corporation, and which draft this plaintiff was compelled to pay and did pay;" and the bill alleged the recovery of the judgment, the neglect of the corporation for thirty days after demand to pay or exhibit property to satisfy the execution issued thereon, and the return of the execution unsatisfied, before the filing of the bill; and, as grounds on which it was expected to charge the individual defendants personally, set forth their neglect to file the certificate, as above mentioned, and referred to the statutes of 1863, C. 246, § 2.

The bill was taken for confessed against the corporation. Bates and Cook appeared, but declined to file answers. The other individual defendants answered, alleging, among other things, that the corporation was not a manufacturing corporation. Lord and Sleeper also denied that they ever were directors or officers of the corporation; and the bill was subsequently dismissed as to them. The plaintiff filed a general replication, and the case was referred by Morton, J., on September 25, 1869, to a "special commissioner, to take and report all evidence the parties may choose to introduce, subject to the opinion of the court as to the relevancy or competency of the same."

Under this reference, evidence was taken by the commissioner concerning debts of the corporation to various creditors, and, among them, concerning two drafts, each for \$5,500, payable respectively in five months and six months, and accepted and paid by the plaintiff, and two judgments recovered respectively thereon by him against the corporation, in the superior court in Suffolk, at April term, 1867, the first of said drafts being in the following words and figures, and the second in the same, except as to the time of payment.

"\$5,500.

Boston, April 3, 1866.

To EBY BYERS, Harrisburg, Penn.:

Five months after date, pay to the order of Charles H. H. Cook, Treasurer, fifty-five hundred dollars, value received, and charge the same to the account of, as advised.

CHARLES H. H. COOK,

Treasurer Franklin Coal Co. of L. V."

The evidence showed that the plaintiff accepted these drafts in compliance with the written request of the president of the corporation for a temporary loan of the plaintiff's credit for its accommodation, and under an agreement with the corporation, which was not fulfilled, to furnish him with a quantity of coal equal in value to the amount of the drafts, before their maturity.

Upon the return of the commissioner's report, the case was reserved by Wells, J., upon the pleadings and the report, for the consideration of the full court, "such judgment or order to be entered therein as upon their determination of

the questions raised thereon shall be found to be necessary or proper," and under this reservation was argued in November, 1869. The substance of the evidence, the provisions of the statutes, and all other material facts, are given in the opinion.

H. G. PARKER and T. WESTON, JR., for the plaintiff.

C. W. HUNTINGTON, for Caldwell.

C. F. CHOATE, for Sleeper.

C. A. WELCH (E. D. SOHIER with him), for Wightman and Matchett.

H. W. PAINE, for Hillard.

MORTON, J.

This is a bill in equity against the Franklin Coal Company, of Lykens Valley, and certain persons alleged to be officers of said company. It appears that the defendant corporation was duly organized in 1863, under the provisions of the sixty-first chapter of the General Statutes, for the purpose of mining coal in the State of Pennsylvania; that the defendants Bates, Wightman, Hillard, Caldwell, Matchett and Cook were elected officers of said corporation on the 20th day of June, 1865, and continued in office until the 19th day of June, 1866; that they neglected to file the annual certificate required by the statute of 1862, c. 210; that a certificate in due form was filed June 19, 1866; that in May, 1867, the plaintiff recovered two judgments against the corporation; that the executions which issued thereon were placed in the hands of an officer, who made a demand upon the corporation; and that the corporation neglected for thirty days after demand to pay the amount of the judgments, or to exhibit property sufficient to satisfy the executions, which were thereupon returned unsatisfied. It is obvious that the plaintiff brought this suit under the provisions of the statute of 1862, c. 218; his bill is in behalf of himself and all other creditors of the corporation, and all the proceedings are such as are required by that statute in order to enforce a liability against officers.

The first question which arises is, whether that statute applies to corporations of this character. The Franklin Coal Company was not a manufacturing corporation. It was organized for the purpose of mining coal in Pennsylvania, and the evidence shows that to have been its sole business. It was a mining corporation, and not a corporation for manufacturing purposes.

The statute of 1862, c. 218, does not apply to such corporations. Its title is, "An act to define and regulate the enforcement of the liabilities of officers and stockholders of manufacturing corporations." It provides, in the first section, that "the officers of manufacturing corporations" shall be liable for the causes and in the manner therein specified; and all the subsequent provisions are applicable only to "such" corporations.

If we look at the history of the legislation in this commonwealth upon the subject of corporations, we find that a distinction is constantly maintained in the statutes between manufacturing and other corporations: Statute 1829, c. 53; Rev. Statutes, c. 38; Statutes 1851, c. 133; Gen. Statutes, cc. 60, 61, 68. In view of the uniformity with which this distinction is recognized in the statutes, it can not be presumed that the legislature intended to include other kinds of corporations under the description of "manufacturing corporations" in the statute of 1862. Being in its express terms applicable only to manufacturing corporations, it can not by construction be extended to include mining corporations.

These considerations dispose of the claims of all the creditors except the plaintiff Byers. As the act of 1862 does not apply to the case, it follows that the bill can not be maintained for the benefit of the other creditors who are not parties thereto; and it is not necessary to consider whether they can maintain suits in their own names.

But the plaintiff contends that he can maintain this bill under the Gen. Sts., c. 68, § 17, which provides that, when the officers of a corporation are liable for any of its debts, or for their acts and omissions respecting its business, the party entitled may, instead of any remedy otherwise provided, maintain a suit in equity. As the statute of 1862 does not repeal this provision, either expressly or by implication, except so far as

relates to manufacturing corporations, it would seem that the appropriate remedy to enforce any liability which attached to these defendants by reason of their failure to file the annual certificate of the condition of the corporation, is by a suit in equity in this court. The bill in this case is framed under the act of 1862, and contains some unnecessary averments; but such averments may be rejected as surplusage, and the bill may be maintained under Gen. Stats., c. 68, § 17, if upon the facts shown the plaintiff is entitled to relief.

By the Stat. of 1863, c. 246, § 2, it is provided that the officers who neglect or refuse to file the certificate required by the Stat. of 1862, c. 210, "shall be jointly and severally liable for all debts of the corporation contracted during the continuance of such violation, refusal or neglect." Under this provision, upon the facts proved and admitted, the defendants are liable for all debts of the corporation contracted between July 20, 1865, and June 19, 1866. Has the plaintiff proved a debt of this character?

His debt arose as follows: On April 3, 1866, the plaintiff accepted two drafts for the accommodation of the corporation, drawn by its treasurer, one payable in five months and the other in six months from their date. These drafts were negotiated at or about the time they were accepted, and at or about their maturity were paid by the plaintiff. The question is, whether the debt thus created is a debt contracted at the time when the plaintiff paid the drafts or at the time when he accepted them.

This is not an open question in this commonwealth. The plaintiff was an accommodation acceptor, and the relation between the corporation and him was that of principal and surety. In *Rice v. Southgate*, 16 Gray, 142, it was decided that the liability of a principal to indemnify his surety for any payment the latter may be compelled to make for the former, takes effect from the time when the surety becomes responsible for the debt of his principal, and that, upon payment by the surety, his debt is "a debt contracted" at the time he became responsible, and not at the time of such payment. This is decisive of the case at bar; and it follows that the original debt of the plaintiff was a debt contracted at the time he accepted the drafts, and therefore one for which the defendants were liable.

But the defendants contend that if this be so, yet the judgments against the corporation, obtained by the plaintiff, merged and extinguished the debt, and thus relieved them from their liability. It is true that in many cases, in this commonwealth and elsewhere, the rule of law is broadly stated to be that a simple contract debt is merged and extinguished by a judgment founded on such debt. But this rule is subject to important qualifications. It is not true that in every case, and for all purposes, a simple contract debt is merged and extinguished in a judgment founded upon it. Generally, and perhaps universally, the judgment, so far as the parties to it are concerned, merges the debt; but in cases where there are two or more persons who are severally liable for the debt, a judgment against one does not merge or extinguish the debt as to the other. Thus, in the familiar case of an indorsed promissory note, a judgment against the maker does not merge or extinguish the note as to the indorser. For some purposes such judgment is a merger of the original debt; in any suit or proceeding against the maker, such would be its effect; but it does not affect the liability of the indorser, and a suit may be maintained against him upon the note: *Gilmore v. Carr*, 2 Mass. 171; *Porter v. Ingraham*, 10 Mass. 88; *Ward v. Johnson*, 13 Mass. 148. The same is true as to the liability of sureties, and of all parties whose liability for the debt is collateral. A judgment against the principal debtor merges the debt as to him, but it does not operate to defeat any collateral, concurrent remedy against other parties, which the creditor may have: *Campbell v. Phelps*, 1 Pick. 62.

We are of opinion that the case at bar falls within this principle. The corporation is the principal debtor, primarily liable for the plaintiff's debts; the liability of the defendants is secondary and collateral. The plaintiff's judgment merges his original debt as to the corporation, and all the necessary consequences of such merger must follow. If he should sue the corporation upon the original debt it would be a conclusive answer to say that it was merged in the judgment; but as to the defendants, it does not merge the debt in the sense that it extinguishes or satisfies it, so as to deprive the plaintiff of the remedy which the statute gives him to enforce their collateral liability.

The view we have taken seems to have been acted on in the legislation and adjudications upon this subject. Thus the statute of 1862, c. 218, applicable to manufacturing corporations, provides that the creditor must obtain a judgment against the corporation before he can enforce the collateral liability of officers or stockholders. And in *Cambridge Waterworks v. Somerville Co.*, 4 Allen, 239, this court held that a creditor could not maintain a bill in equity against a stockholder, under the Revised Statutes, c. 38, § 31, without first obtaining a judgment against the corporation.

The defendants rely upon the cases of *Handrahan v. Cheshire Iron Works*, 4 Allen, 396, and *Mason v. Cheshire Iron Works*, Ib. 398; but upon a careful consideration of the facts of these cases it will be seen that they are not in conflict with the views we have taken. In *Handrahan v. Cheshire Iron Works* the facts were these: The plaintiff, having a debt against the corporation, for which one Richmond was liable as a stockholder, commenced a suit thereon against the corporation, but did not summon said Richmond as a stockholder. He obtained judgment against the corporation, and afterward brought this suit, declaring upon his judgment, and summoned Richmond as a stockholder. At the time when said judgment was rendered, Richmond had ceased to be a stockholder. The question before the court was, whether Richmond could be held in this form of action. It is clear that he could not. The laws in force at the time the creditor's debt was contracted created the liability of the stockholders, and determined the remedy to enforce this liability. The remedy thus provided for the creditor, was to bring a suit upon his debt, summoning in the stockholders, and, after obtaining judgment against the corporation, to levy his execution upon the person or property of such stockholders as were summoned, or to bring a bill in equity against such stockholders to enforce his judgment: *Cambridge Waterworks v. Somerville Co.*, 4 Allen, 239. The remedy thus provided was the only remedy open to the creditor: *Erickson v. Nesmith*, Ib. 233, and cases cited. Having taken judgment against the corporation, it was impossible for the plaintiff to pursue this remedy. As we have before seen, the judgment, as to the corporation, merged the original debt, so that he could not maintain an action against the cor-

poration, and the necessary consequence of such merger was to prevent him from pursuing the only remedy which the law provided to enforce the liability of stockholders. He therefore adopted a remedy not provided by law, and it was held that such remedy was not open to him.

The case of *Mason v. Cheshire Iron Works* differs only in the fact that in the original suit Richmond was summoned as a stockholder. The result was necessarily the same. The plaintiff pursued the statute remedy in part; but instead of levying his execution upon the person or property of the stockholder, or bringing a bill in equity, he commenced this suit upon his judgment. In each case the fatal objection was that the plaintiff was attempting to pursue a remedy not provided or recognized by law.

The case of *Taylor v. New England Co.*, 4 Allen, 577, is like *Ha drahan v. Cheshire Iron Works*.

Upon the whole, we are of opinion that the fact that the plaintiff has taken judgment against the corporation does not preclude him from enforcing the liability of the officers for the original debt by a bill in equity. It follows that the plaintiff, having discontinued against the defendants, Lord and Sleeper, is entitled to a decree against the other defendants.

Decree accordingly.

Upon the application of the plaintiff, after this decision, for a final decree in his behalf against the individual defendants, for the amounts of the judgments upon both of the drafts, they objected that the bill included only one of the drafts; and he thereupon moved for leave to amend it so as to include the other. They then objected to the allowance of the amendment; and at the same time asked "that the case be now sent to a master, for otherwise set down for hearing, upon the question of fact whether any debt, and if so, what and to what amount, is due the plaintiff, which he ought to recover against these defendants; claiming, as reason therefor, that the demand set up in the bill and which was understood to be that claimed as the foundation therefor, and the one upon which the testimony was taken before the commissioner, was the judgment recovered in the superior court, as therein described; whereas, by the decision of this court, said acceptance is held not to be merged in said judgment, as against

these defendants; and the defendants claim that they have not yet had, but now ought to have, a trial upon the validity and amount of this demand against them."

"The several questions thus presented" were reserved by Wells, J., for the consideration of the full court, "such decree to be entered, or other disposition made of the case, as shall upon hearing thereof be deemed proper." Upon the calling of the case for argument at the present session, the defendants filed a petition for leave to re-argue the question of the merger of the original debt in the judgment, and had leave accordingly.

PAINE & WELCH (HUNTINGTON with them), for the defendants.

PARKER & WESTON, for the plaintiff.

MORTON, J.

After the former decision in this case the plaintiff filed a motion for leave to amend his bill, and for a final decree. At the hearing upon this motion, the defendants, by leave of court, have re-argued the question whether the judgments obtained by the plaintiff against the corporation operated by way of merger to extinguish the liability of the defendants. After a full and careful consideration of the learned argument of the defendants' counsel upon this point, we are unable to see any reason for doubting the correctness of our former decision. The defendants rely upon the cases of *Handrahan v. Cheshire Iron Works*, 4 Allen, 396, *Mason v. Cheshire Iron Works*, Ib. 398, and *Taylor v. New England M. Co.*, Ib. 577, and contend that the decision in the case at bar can not be upheld without overruling those cases. We can not concur in this view.

In the case of *Handrahan v. Cheshire Iron Works*, which the other cases cited followed, the attempt was to enforce the liability of a stockholder for a debt due by the corporation. The stockholder, who was summoned in, was liable for the original debt due the plaintiff; but the plaintiff had recovered judgment against the corporation, and this suit was necessarily an action of contract upon this judgment. The necessary re-

sult of the application of the common law doctrine of merger to the facts was, that the plaintiff could not maintain his action against the stockholder. The only remedy which he had, at law, to enforce the collateral liability of stockholders, was defeated by his act of merging in a judgment his debt against the corporation. The statute under which he was proceeding did not give him independent, concurrent remedies against the corporation and the stockholders, but only a single joint remedy against both. He elected to put his debt into a judgment, and thus merge it as to the corporation; and he was held to all the necessary consequences of such merger, one of which was, that it created a new debt, contracted at the time of the judgment, upon which alone he could sue. Speaking in reference to the facts of *Handrahan's Case*, it is practically correct, if not technically accurate, to say that the judgment merged the debt and extinguished the liability of the stockholders. But it can not be deemed to be an authority for the proposition that in cases where a creditor has several obligors for the same debt, and independent remedies against each, the recovery of judgment against one extinguishes the liability of the others. In the case at bar, the law gives the plaintiff concurrent, independent remedies, against the corporation and the officers. He may pursue each independently of the other, and the fact that he has pursued and exhausted his remedy against the corporation does not affect his right to enforce by proper process the collateral liability of the officers. It seems to us that the two cases are quite distinguishable, and that the case relied upon by the defendants does not control or apply to the case at bar.

The other question presented to us is, as to the allowance of the plaintiff's motion to amend. The policy of our laws is very liberal in favor of allowing amendments in form or substance. They are uniformly allowed where the allowance will promote justice and prevent litigation and delay. We are of opinion that under the circumstances of this case the amendment ought to be allowed. In September, 1869, the case was, by order of the court, referred to a special commissioner "to take and report all evidence the parties may choose to introduce, subject to the opinion of the court as to the relevancy or competency of the same." Under this order the parties took evidence before the commissioner, and apparently

went into a full investigation as to both drafts held by the plaintiff. Evidence was taken as to the inception and validity of each. Upon the report of the evidence, they had a full hearing before the court upon both drafts, no objection being made that the pleadings did not cover both. The case has been tried as if the allegations now offered by way of amendment had been contained in the original bill. The allowance of the amendment will prevent useless delay and expense, and will work no injustice to the defendants. If it appears that they have not been fully heard upon the question of the validity of the second draft, the case will be re-opened for that purpose. We think, therefore, that the amendment should be allowed, the question of terms being reserved.

Amendment allowed.

At April term, 1871, the case was again heard by Wells, J., under the amended bill, and a deposition of the plaintiff was put in evidence, to the effect that he accepted the two drafts within a few days from their date, and before April 10, 1866, by the written request of the president of the corporation, and in accordance with an understanding had with him concerning deliveries of coal to be made before their maturity, as appeared also in the evidence formerly taken by the commissioner. Neither party desired to offer further evidence. The defendants contended, among other things, that the drafts were drafts of Cook and not of the corporation, and therefore that they were not subject to individual liability in relation to them; and this question, with others, was reserved for the decision of the full court, "such judgment or decree to be entered, order made or further direction given as in the opinion of the court the decision which shall be rendered upon all or any of said questions may require or make proper," and was argued in March, 1872.

MORTON, J.—The defendants have argued only one of the questions presented by the report. They now contend that the drafts accepted by the plaintiff were the drafts of Cook, and not of the Franklin Coal Company of Lykens Valley, and therefore that the officers of the company are not liable. But we are of opinion that, so far as the question of the liability of the defendants in this suit is concerned, it is immaterial whether they are to be regarded as the drafts of the corporation

or of Cook personally. The evidence conclusively shows that the plaintiff accepted the drafts in question for the accommodation of the corporation and under a contract that the corporation would indemnify him. The liability of the corporation was created by their contract of indemnity, and is precisely the same, whether the drafts are to be regarded as drawn by Cook or the corporation. In either event, the relation between the corporation and the plaintiff is that of principal and surety; and the debt of the corporation, for which the officers are made liable by statute, was contracted when by the acceptance of the drafts by the plaintiff the contract of indemnity took effect.

Decree for the plaintiff.

STEELE V. DUNNE.

(65 Illinois, 298. Supreme Court, 1872.)

The liability statutory—Strict proof and construction. In order to fix liability upon one for the debt of a private corporation organized under the general law which makes stockholders individually liable to the creditors of the company to an amount equal to the stock held by them, it must be made plainly to appear that he was a stockholder, and within the purview of the law. The meaning of the statute can not be enlarged so as to include cases not expressly within its provisions.

The mere fact that the defendant was a director in such a company is not sufficient to make him liable individually within the meaning of the statute.

Liability of stockholder where company has re-organized. Where it appeared that the defendant was a director in the Piute Mining Co., which company had never issued any certificates of stock, and it was not shown that he ever subscribed for stock, but it appeared that he was a stockholder in the Piute Silver Mining Co., which was a company subsequently organized with a different directory and in a manner succeeding the Piute Mining Co: *Held*, that he was not liable individually in a suit by a creditor of the first named corporation.

Appeal from the Circuit Court of Cook County; the Hon. HENRY BOOTH, Judge, presiding.

MORAN & ENGLISH, for the appellant.

C. M. HARDY, for the appellee.

SCOTT, Justice, delivered the opinion of the court.

The appellee was formerly secretary of the "Piute Mining Company of Chicago," an incorporated company organized under the general laws of the State. At the March term, 1871, of the Circuit Court of Cook County, he obtained a judgment against that company. On this judgment execution was regularly issued, and was, by the sheriff, returned *nulla bona* before this action was commenced. It is alleged that appellant was a stockholder in that company, and this action was commenced against him to recover the amount of the judgment obtained by appellee against the company.

The statute under which the company was organized provides that all stockholders of every such company shall be severally individually liable to the creditors of the company to the amount equal to the amount of stock he'd by them respectively, for all debts and contracts made by the company prior to the time when the whole capital stock shall have been paid in, and a certificate thereof made and filed as therein required: Gross' Statutes, Chap. 25, Div. 14.

The defense sought to be interposed is that appellant was not, at the date the debt was contracted for which appellee obtained judgment, and never was, a stockholder in the "Piute Mining Company."

It seems to us that the evidence fully sustains the defense. It does not appear that any certificates of stock were ever issued to any one by that company, or that appellant really owned any stock. He had not previously subscribed for any stock. The company was only in existence for a period of about three months.

The company was about to commence business and issue certificates of stock, and for that purpose caused scrip to be printed and a seal to be engraved. When the work was finished it was found that the seal was engraved "The Piute Silver Mining Company of Chicago." The same error, perhaps, occurred in the printing. It was suggested by appellee that the cheapest way to remedy the difficulty would be to file new articles of association, and organize the company by the name "The Piute Silver Mining Company," which was accordingly done. The new company was organized with five

directors, the old company had seven. Appellant was named as a director in both companies.

The "Piute Mining Company" seems to have been then abandoned. No stock had been previously issued, and none afterward.

The new organization having a different and less directory was essentially a new company. It had a new name and a new directory. In the latter company it is admitted that appellant was a stockholder, but appellee never rendered any services for the "Piute Silver Mining Company," and had no judgment against it.

There being no satisfactory evidence in the record that appellant was ever a stockholder in the Piute Mining Company, against which appellee had a judgment, there could be no recovery. What remedy appellee may have had against the directors of the abandoned company who employed him as their secretary, it is not the province of this court to inquire. It is sufficient that under the evidence in this record there can be no recovery as against appellant.

The mere fact that he was a director in the company is not sufficient to make him liable within the meaning of the statutes. It must appear that he was a stockholder before any individual liability can attach. The remedy is purely statutory, and the evidence must show that he is plainly within its purview before he can be made personally liable. The meaning of the statute can not be enlarged so as to include cases not expressly within its provisions. The judgment is reversed and the cause remanded.

Judgment reversed.

PHELAN, Assignee of Central Savings Bank, v. HAZARD.

(5 Dillon, 45. U. S. Circuit Court, Eastern District of Missouri, 1878.)

Stock paid for with property. Unless prohibited by statute, an agreement between the incorporators of a company and the directors, by which the former convey to the company, property needed for the purpose of its operations, and receive payment therefor in full-paid shares of the stock of the company, is, in the absence of fraud, binding upon the parties, and such stock is full-paid stock.

Impeachment by creditor of mode of paying for stock. Whether subsequent creditors of the company can impeach such transaction as respects shares of stock which purport to be full-paid shares, when they are in the hands of a subsequent registered transferee for value, who purchased the same as full-paid shares, relying upon the certificates and the records of the corporation that full payment therefor had been received by the company, *quære*.

Liability of holder of stock paid for with property. The petition of a creditor of the La Motte Lead Co., which had become insolvent and dissolved, was held not sufficient to open an inquiry into the transaction between the corporators and the company, as to the value of the property conveyed to the company in payment of shares, with a view to hold a share owner for the difference between the agreed value and the actual value of the property conveyed.

The plaintiff is a creditor of the La Motte Lead Company, in which the defendant is a shareholder.

The plaintiff in his petition alleges that the said company was incorporated as a manufacturing and business corporation under the laws of Missouri (1 Wag. Stats. 332); that said company issued to Rowland G. Hazard, John G. Copelin, William A. Scott, and R. B. Lockwood, all of the stock it ever issued, of which said Rowland G. Hazard received and held eleven hundred and twenty-five shares, and on the 25th day of October, 1873, transferred 1124 of said shares to the defendant, Rowland Hazard, which he still holds, and *that said shares have never been paid for by any person to the said company, in whole or in part, but remain wholly unpaid*. The petition then alleges that the Central Savings Bank, of which the plaintiff is the assignee, owns and holds certain unpaid promissory notes of the said La Motte Lead Company, dated in April, June, August and September, 1873; that suit was brought thereon within one year after the same became due (1 Wag. Stats., Sec. 13, p. 336), and that there is due thereon to the plaintiff from the La Motte Lead Company, \$110,000; that there has been no meeting of the directors of said company since March 10, 1871, and that said company, before and at the time the said notes fell due, was, and still is, insolvent and without property, and that it has wholly ceased to do business. The petition also states that by the laws of Missouri, the defendant is liable for the plaintiff's debts aforesaid to the extent of the par value of said 1124 shares; wherefore the plaintiff demands judgment against the defendant, Rowland

Hazard, for the amount of his said debt against the La Motte Lead Company.

The answer admits the incorporation and organization of the La Motte Lead Company as alleged; that Rowland G. Hazard **was an** original subscriber for stock, and received 1125 shares; that he transferred 1124 shares thereof to the defendant, Rowland Hazard. The answer **denies** that the said shares were not paid for, and avers that said company was *paid for the same in full* at the time the certificates of stock were issued; that they were issued as full-paid stock, and that the records and books of the corporation so showed, on the faith of which the defendant bought of the said Rowland G. Hazard the said 1124 shares for value as full-paid stock, and the same was transferred to him on the books of the company.

Such were the issues joined, so far as it is now material to state them.

On the trial the facts stated in the charge of the court to the jury appeared.

The charge of the circuit judge to the jury was as follows:

*"Gentlemen of the jury:—*Mr. Lockwood, Mr. Scott and Mr. Rowland G. Hazard, in 1839, owned certain real estate, supposed to be mining property, and known as the Mine La Motte property. They owned it subject to certain mortgages—a mortgage to Fleming for \$525,000, on five sixths of the property, which was a first mortgage, and a mortgage to one Valle on the other one sixth, for about \$40,000, or for a considerable sum of money; and the said Rowland G. Hazard held a second mortgage on the property for about \$50,000. While the property was in this condition, Lockwood, Scott and Grant, under the statute of Missouri, framed articles of incorporation to incorporate themselves as the Mine La Motte Company, the name being subsequently changed to the La Motte Lead Company, and in the articles of incorporation the said Rowland G. Hazard, the said Lockwood and the said Scott were named as directors. When the corporation had been thus organized, the said Lockwood, Scott, and Rowland G. Hazard made a contract with the directors of this company, they being the directors, and the only directors, whereby they agreed to convey the property, subject to these mortgages, to this newly

formed organization, for the consideration of \$300,000. The directors of this corporation agreed to purchase it at that rate, and pay for it by the issue of full-paid stock to the vendors. A deed was made by the vendors and accepted by the company, and full-paid stock issued as follows:

	Shares.
To the said Rowland G. Hazard.....	2,250
“ “ B. B. Lockwood.....	375
“ “ W. A. Scott.....	375
<hr/>	
Making in all.....	3,000

Certificates were issued for full-paid stock accordingly. The only payment made for this stock was the execution of a deed by Hazard, Scott and Lockwood to the corporation for an expressed consideration of \$300,000, and reciting therein the incumbrances above referred to. One of the certificates of stock held by the defendant is as follows:

“ Organized under the laws of the State of Missouri.
Full-Paid. Non-Assessable.

“ La Motte Lead Company.
shares—Shares \$100 each. Capital \$1,000,000.

“This is to certify that Rowland Hazard is the owner of fifty (50) shares of the capital stock of the La Motte Lead Company, transferable only on the books of the company in person or by attorney on surrender of this certificate.

“(Signed) _____, *Secretary,*
 “ _____, *President.*

“MINE LA MOTTE, Mo., October 25, 1873.”

“The company adopted a by-law as follows:

“The stock of the company shall be assignable or transferable at its office by any holder thereof, either in person or by regular appointed attorney, in the presence of the treasurer or secretary, or one of the directors.

“The books of the lead company under date of Dec. 3, 1869, show that, on motion, it was

“*Resolved.* That the company proceed to the purchase of a tract of land called Mine La Motte, and the pine lands, agreeably to the proposal for the sale thereof submitted by the owners, and now standing in the names of Bradley B. Lock.

wood and William A. Scott, and that the secretary be directed to receive a conveyance therefor.'

"The deed was received and recorded, and subsequently reported to the corporation. Of this \$1,000,000 of capital stock, only \$300,000 were ever subscribed or issued. The defendant purchased from the said Rowland G. Hazard, in good faith, for value, 1,124 shares of this stock, which he now holds, and which were transferred to him on the books of the company.

"On these facts, gentlemen of the jury, the plaintiff, in this form of action, and under the averments made in the petition, is not entitled to recover, and it is not competent for the plaintiff in this case to establish a liability on the part of the defendant by showing, in point of fact, that the property originally conveyed by Lockwood, Scott and Rowland G. Hazard to the company was not worth \$300,000, or that it was not worth anything over and above the mortgages upon it at the time of the transfer to the company in payment of the stock subscribed, even although the said corporation is insolvent and dissolved, as alleged in the petition."

TREAT, J., concurs.

The jury thereupon found a verdict for the defendant. The plaintiff moved for a new trial, on the ground that the foregoing charge was erroneous in point of law. The motion was overruled, for the reason stated in the opinion of the court.

MESSRS. BROADHEAD and CONROY, for the plaintiff.

NOBLE & ORRICK, for the defendant.

DILLON, Circuit Judge.

The gravamen of the plaintiff's case is that the defendant is the holder, by transfer, of certain unpaid shares of stock in the La Motte Lead Company, and that, under the statutes of Missouri (1 Wag. Stats., p. 293, Sec. 22), the plaintiff, as a creditor of that company (which is insolvent and dissolved) may compel the defendant to pay for the said shares held by him, or pay the balance due thereon. As between the transferrer of said shares and the corporation which

issued them, it was agreed that the shares had been fully paid for by the transferrer to the company.

The charge to the jury was given, without any opportunity to examine the law, and in accordance with what seemed, at the moment, to be the principle applicable to the case as made at the trial. Mr. Broadhead's argument at the bar for the plaintiff, in support of the motion for a new trial, tended to shake the impressions I had at the trial; and this in connection with the importance of the case, in the amount as well as the principles involved, has induced me to look into the matter with some care and deliberation.

It will be observed that the petition charges no fraud in the agreement by which the corporation purchased the mining property and received a conveyance thereof, in payment for which, and as part of the same transaction, it issued its paid-up shares of stock. The records of the corporation showed the whole transaction—that it had received and recorded a deed for the property, and paid the consideration agreed upon by the issue of full-paid certificates of stock to the vendors. This was long anterior to the creation of the indebtedness to the plaintiff's assignor.

The plaintiff—a single creditor—does not for himself, or for himself and other creditors, file a bill to impeach as fraudulent this transaction between the corporation and the original shareholders; but he simply states that the shares of stock issued to Rowland G. Hazard have not been paid for, either by him or by the defendant, the transferee and present holder of the shares. Issue was taken on this averment, and the proof showed that the shares in question had been paid for precisely as they were originally agreed to be paid for, viz., by a conveyance of the mining property to the corporation. This conveyance has been received and recorded by the corporation. Unless this agreement is rescinded or set aside for fraud, how can it be said that the stock has not been paid for? The parties have agreed that it has been paid for, and that agreement is conclusive, unless it is rescinded or impeached for fraud, and this can not be done unless the attack is directly made. Undoubtedly such an attack could be made while the stock was in the hands of the original takers of it; but it is not so clear that it could be made by a subsequent

creditor of the corporation against a transferee of the stock for value, who purchased the same in good faith as full-paid stock, relying upon the records of the corporation, which showed the shares to have been fully paid for, and the manner in which the payment had been made.

Lord Justice Mellish, in one case, seemed to be of opinion that a *bona fide* transferee of shares of stock, which purported to be full-paid, held the same exempt from a liability to be called upon to make payment therefor on the ground that the original subscriber had not fully paid for them. But it is not necessary, under the pleadings in this case, for us to consider or determine that question.

The cases are numerous in which such transactions as that which was entered into in this instance between the owners of the mining property and the corporation which they formed, have come before the courts, and, in absence of fraud, have been sustained: *Pell's Case*, Law Rep., 5 Ch. 11; *In re Baglan Hall Colliery Co.*, Id. 346; *Maynard's Case*, L. R., 9 Ch. 60; *Schroder's Case*, L. R., 11 Eq. 131; *Cleland's Case*, L. R., 14 Eq. 387; *Sichell's Case*, L. R., 3 Ch. 119; *Jones' Case*, L. R., 6 Ch. 48; *Forbes' Case*, L. R., 5 Ch. 270; *Pritchard's Case*, L. R., 8 Ch. 956; *Ferrao's Case*, L. R., 9 Ch. 355; *Bush's Case*, Id. 554; *Dent's Case*, L. R., 8 Ch. 768; *Corling's Case*, L. R., 1 Ch. 115; *Savage v. Ball*, 17 N. J. Eq., 142; *Smith v. North American Co.*, 1 Nev. 423; *Goodrich v. Reynolds*, 31 Ill. 490; *Spense v. Iowa Valley Co.*, 36 Iowa, 407, 411.

The exigencies of the case now before the court do not require us to examine into the soundness or consistency of all these decisions. We shall refer to a few of them by way of illustration, and because, whatever else they hold, they clearly establish these propositions:

1. That such a transaction as that here in question is not *ultra vires*, and absolutely void.
2. That the contract is valid and binding upon the corporation and the original sharetakers, unless it is rescinded or set aside for fraud, and that, while the contract stands unimpeached, the courts, even where the rights of creditors are involved, will treat *that* as a payment which the parties have agreed should be payment.

These propositions are decisive of the present case.

For the purpose above indicated, a brief statement of some of the English cases upon this subject will now be given.

In the origin, purposes, situation of the property, and fate of the company, the case of the *Baglan Hall Colliery Co.*, Law Rep., 5 Ch. 346, is strikingly analogous to the case of the *Li Motte Lead Company*. In the case just cited, nine persons bought a moiety of a colliery from Parker for £10,000, and the ten, after working it for some time, agreed to form a company for carrying it on, and a company was accordingly registered, the memorandum of association of which was subscribed by the owners of the colliery for numbers of shares proportioned to their respective interests, the nominal amount of shares subscribed for being £20,000. The memorandum of association stated nothing as to the shares being treated as paid-up shares, but the articles of association provided that all the shares subscribed for in the memorandum should be treated as fully paid up. The colliery was made over to the company, but no other payment was made by any of the subscribers of the memorandum. No other shares than those subscribed for by the memorandum were ever allotted; and it was held (reversing the decision of Malins, vice-chancellor) that the subscribers of the memorandum of the association were not liable as contributories, for *that the shares must be taken as having been fully paid up by the handing over the colliery*. In pronouncing his judgment on appeal, Lord Justice Giffard said: "Here was a colliery in which at first Parker was alone interested. He sold a moiety to certain gentlemen for £10,000, which was paid. The colliery was then subject to two mortgages, for £3,000 and £1,000. The owners went on working the colliery, not very successfully, and then determined to form a limited company, in order to avoid incurring further personal liability. It was the policy of the Companies Act to enable this to be done, and with the soundness of that policy we have nothing to do."

After stating that the colliery had been handed over to the company in consideration for the shares of the subscribers, the Lord Justice adds: "According to the decided cases, this, *in the absence of fraud*, was an effectual paying up of the shares in full. The test to be applied is this: Could the company,

by any proceeding, have set aside the transaction by which it was arranged that the owners of the colliery were to have paid-up shares as the price of their interests in the colliery? And I say, on the evidence, that the company clearly could not. It was urged that the parties only agreed with themselves, and that therefore there was no contract. But every company is started by parties agreeing among themselves, and it is idle to say that they have nobody to agree with. There is nothing in the evidence to show that any person has been deceived. It appears probable that if the additional £3,000 which was raised by the last mortgage had been applied in working the colliery, the concern would have prospered." [The colliery had been sold by the mortgagee under his power of sale for £4,500.] "The case is precisely the same as *Pell's Case*, Law Rep., 5 Ch. 11, and it must be held that the persons who subscribed the memorandum of association, have paid all that they were bound to pay. Creditors have no ground for complaint, for persons who are about to enter into transactions of magnitude with an individual, make inquiry into the state of his circumstances; and so, if they enter into them with a limited company, it is their own fault if they do not inquire into the nature of the memorandum and articles, and look to the register of shareholders. In this case there was no concealment, and it would, in my judgment, be a total misapplication of the act to say that a transaction like the present is not authorized by it. If strangers (no misrepresentation being made) choose to deal with a company without inquiry, they have no right to complain when it turns out that the shareholders are under no personal liability."

In *Pell's Case*, above referred to, "The master of the rolls," says Lord Justice Giffard, in the same opinion (Law Rep., 5 Ch. 355), "allowed the agreement between Pell and the company that he should hand over the property to the company, and that his shares should be taken as fully paid-up shares, to stand, so far as the value of the property went, but directed an inquiry as to its value. This was varied on appeal, and the agreement not being impeached, it was held that the shares must be taken as fully paid up by the handing over of the property."

Commenting on *Pell's Case*, Lord Chancellor Hatherley said: "The master of the rolls thought that Pell, being bound to pay the full amount of £20 per share, was not to be taken to have paid it in full unless the property he handed over was worth that amount. That result, however, could only be arrived at by rescinding the contract to buy Pell's business, and Lord Justice Giffard thought that the contract, not being impeached, must be treated as a good contract, and one that ought to be acted upon, so that no question could be raised as to the actual value of the business made over." *Forbes & Judd's Case*, Law Rep., 5 Ch. 270-273; *Fothergill's Case*, 8 Id. 270; *Prichard's Case*, Id. 956.

In *Schroder's Case*, Law Rep., 11 Eq. 131, shares taken in a company were decided to be lawfully paid for in Confederate bonds, at the market price, and in tea, which was required for the company's purposes.

In *Spargo's Case*, Law Rep., 8 Ch. 407, decided by the lord justices on appeal, the same doctrine was applied with reference to a company to which the Companies Act of 1867 (section 25), applied. That section in the act was in these words:

"Every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof *in cash*, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the register of joint stock companies at and before the issue of such shares."

Spargo's Case is thus stated by Vice-Chancellor Malins in a subsequent similar case (*Coates' Case*, Law Rep., 17 Eq. 169, 177): "Spargo signed the memorandum of association for thirty-one shares, and he was, in consequence, liable to pay £1,550. It does not require the act of 1867 to show that such a person is liable for the amount for which he subscribes, and the vice-warden of the stannaries court put him on the list of contributories, considering that he had incurred a liability by signing the memorandum of the association, which could only be discharged by payment *in cash*. But Spargo had also agreed to sell to the company the lease of a mine for £2,776 and in a settled account they gave him credit for the £2,776, as against the price of his shares. That was treated by the court of appeals as a good payment. The lease of the mine

- was the thing with which the company was trading, and so they gave him credit for that." And it was held that the aforementioned section 25 of the Companies Act of 1867, had not altered the law as to what would constitute a good payment on shares.

In *Coates' Case*, *supra*, the facts were shortly these: The memorandum of association of a company formed for the purpose of purchasing and carrying on the business before that time carried on by Coates, was subscribed by Coates for twenty-five hundred shares, which were of £1 each. It was also subscribed by other persons, by which the number of shares taken amounted to sixty-two hundred and sixty-five, out of a total capital of seventy-five hundred shares; and the company could only issue fresh shares by special resolution. The articles of association stated that an agreement had been prepared between Coates and the company, for the sale of the business to the latter for £5,000, of which one half was to be in fully paid-up shares of the company. This agreement was executed shortly after the registration of the memorandum and articles of association, and was filed with the registrar of joint stock companies. As between Coates and the company, the shares for which he signed the memorandum were treated as being the fully paid-up shares which he took as part of the purchase money, and he was debited in the books with £2,500 due on the shares, and credited with £5,000 as the price of the business. Under these facts it was held that Coates was entitled, even as to creditors of the company, to treat the shares for which he subscribed the memorandum, as the same shares as those for which he sold his business, and that the shares were paid for *in cash*, within the meaning of the 25th section of the act of 1867. "In truth it appears to me," says Lord Justice James, Law Rep., 8 Ch. 411, "that anything which amounted to what would be in law sufficient evidence to support a plea of payment, would be a payment in cash within the meaning of this provision, section 25 of Companies Act of 1867. The object of the section was, I apprehend, to prevent such contracts as had been before the court in *Pellatt's Case*, Law Rep., 2 Ch. 527, and *Elkington's Case* Id. 511, in which a man was to take shares, and to pay for them by supplying goods when wanted." Applying these

principles to *Coates' Case*, above referred to, Vice Chancellor Malins, *Coates' Case*, Law Rep., 17 Eq. 169, 179, says: "It is perfectly clear that in this case the company had entered into a contract which would have justified their paying Mr. Coates £2,500 in cash. If they had fulfilled that contract, they would have handed him bank notes or a check, which he would have handed back again in discharge of the twenty-five hundred shares for which he signed the memorandum of association.

* * * I am therefore of opinion that the transaction by which credit was given to Mr. Coates for the value of his business, is precisely the same as giving Mr. Spargo credit for the value of his lease. It was settled in account, and they would have been justified in handing the money to him, and then he would have handed it back to them in payment of the calls on the shares for which he had subscribed the memorandum of association. I think, therefore, that Mr. Coates is not liable to pay anything on these shares." The case was one in which the official liquidator of the company, which had become insolvent, sought to enforce the alleged liability of Mr. Coates by having him placed on the list of contributories for twenty-five hundred shares in the company for which he had signed the articles of association.

Without pursuing the subject more at length, we are of opinion that the direction to the jury was right, and that the motion for a new trial must be overruled.

TREAT, J., concurs.

Judgment on the verdict.

NOTE.—There are later decisions than those cited in the principal case, to the effect that the *bona fide* purchaser for value of shares issued by a corporation which falsely purport to be full-paid shares can not be held liable to pay the same where it is not shown that he purchased with notice of the facts: *Foreman v. Bigelow*, 13 M. R. — before CLIFFORD and LOWELL, JJ., and where the later cases are referred to, including *Nichol's Case*, 26 Weekly Rep. 334; *Barkinsaw v. Nicholls*, Id., 819; *Steacy v. Little Rock R. R.*, 5 Dill. 348.

MILROY V. THE SPURR MOUNTAIN IRON MINING CO.
AND WILLIAM G. THOMPSON.

(43 Michigan, 231. Supreme Court, 1880.)

Practice—Separate actions. A perfected claim for labor will not support separate actions for the different amounts into which it may be divided even though portions of it have been assigned and the division of the claim corresponds to the periods for which the labor was hired.

Justice's jurisdiction. An action on a labor debt may be brought in a justice's court, against a corporation and stockholders jointly, under Act 113 of 1877, § 35. The legislature is not forbidden by the constitution to give jurisdiction to the circuit courts in cases where the amount claimed is less than \$100.

Justice of the peace, his own clerk. Act 113 of 1877, § 35, provides, that in actions on labor debts, the clerk of the court shall indorse directions on the execution. *Held*, to refer to the officer issuing execution, and not to exclude the justices' courts, in which the justice is his own clerk, from jurisdiction of such actions.

Judicial notice of non-residence. A Michigan court may well take judicial notice that stockholders in the mining corporations of the State are largely non-residents and beyond their jurisdiction for rendering personal judgments.

Individual liability under statute and constitution. The individual liability for labor debts imposed on stockholders by the constitution, means a liability beyond that of members of the corporation, and does not refer to their several liabilities. The legislature may prescribe the means of enforcing the constitutional liability of stockholders for labor debts.

¹ Joinder of parties. Act 113 of 1877, authorizes suits for labor debts to be brought against a corporation alone or jointly with one or more of the stockholders. And where a claimant has elected to sue the corporation alone and has recovered judgment, he can not afterward bring his action on the same debt or upon a claim including it, against the corporation and stockholders jointly, or conversely.

Corporate property first taken. Under act 113 of 1877, the property of a corporation is made primarily liable for labor debts, and the individual property of stockholders secondarily liable, and the stockholders' property can not be taken until the corporate property is exhausted.

Error to the Superior Court of Detroit, submitted Jan. 22, decided April 8.

ASSUMPSIT. Plaintiff brings error.

MOORE, CANFIELD & WARNER, for plaintiff in error.

¹ *Thompson v. Jewell*, 12 M. R. 59.

F. A. BAKER and ASHLEY POND, for defendant in error.

MARSTON, C. J.

This action was brought against the corporation and one of its stockholders under section 35 of Act No. 113 of the Session Laws of 1877, p. 95.

It appeared upon the trial and was not disputed, that the plaintiff and his son, a minor, performed labor for the corporation in 1877 and 1878; that they worked six months, commencing September 1, 1877, and that plaintiff was to receive eighty dollars per month, and for his son's labor thirty-five dollars per month. It was admitted that the value of the services of the plaintiff and his son for the six months ending March 1, 1878, was six hundred and seventy-six dollars.

Early in February, 1878—the exact date does not appear—the plaintiff assigned to Bigelow, Dousman & Co., merchants at Michigamme, of his claim against the corporation, one hundred dollars and eleven cents. On the 13th of February, 1878, suit was commenced in justice's court, to recover the amount so assigned, in the name of the plaintiff herein, for the use and benefit of Bigelow, Dousman & Co., and judgment was rendered therein February 27th, for the amount assigned and costs. This judgment not having been satisfied, this action was brought to recover the entire amount that the plaintiff would have been entitled to, from September 1, 1877, when he and his son commenced to work, to March 1, 1878. The judgment rendered in justice's court was introduced by the defendants, who claimed, first, that such action having been brought against the corporation alone, the labor debt became merged in the judgment therein rendered, and that an action on the claim for labor could not afterward be maintained against the corporation, or the stockholders, or both jointly; and second, that the assignment to Bigelow, Dousman & Co. of a part of plaintiff's claim, action brought and judgment recovered therefor, would prevent the plaintiff from afterward maintaining any action for that portion of his claim which had accrued at the time such action was commenced and not included therein. To meet in part, this second position, the plaintiff claimed that the corporation had assented to the

assignment, and that this would operate as a waiver of the objection. The plaintiff was permitted to recover for the services of himself and son which accrued subsequent to the date of the assignment, but not for any portion accruing previous thereto, and he now assigns error.

There was no evidence in the case tending to show any assent by the company, which would prevent or preclude it from making this defense. There was evidence of negotiations between Bigelow, Dousman & Co., whereby they were to take assignments from the laborers of the amount of their respective accounts, give them credit for a specified time thereafter, and take the paper of the corporation, payable in three months, for the amounts assigned; but this was not consummated; they, Bigelow, Dousman & Co., giving notice of the assignments and commencing suit to recover the amount thereof immediately thereafter.

There can be no question, either upon reason or authority, that a claim like the present can not be split and cut up into separate causes of action to suit the convenience or whim of the plaintiff. If so he could assign, after working six months, a month's wages to an individual or firm, and so of each and every month, and thus have six separate suits commenced; or he might commence six separate actions in his own name. The assignment, and the fact that the suit was commenced in the assignor's name for the use and benefit of the assignees, can in law make no difference; the suit must be treated precisely as though the assignees had no interest whatever therein, so far as this question is involved. The fact that he was hired by the month, and that his wages were payable monthly, can not make any difference. A man may be hired by the day, and at the close thereof a cause of action would accrue to him for his wages, and so for each day that he would work under such an agreement; he could quit work at any time and maintain an action for his unpaid wages. He could not, however, work thirty days or for any other period, then quit, and commence a separate action for each day's wages. In such a case, although the contract of hiring was by the day, and the parties may not have contemplated or provided for any additional labor, yet if they did silently proceed, the one to work and the other to receive his labor, at the ex-

piration thereof the entire amount unpaid would constitute but one cause of action. To permit separate causes under such circumstances would be to subject the debtor to costs and expenses far in excess of the principal debt, besides the annoyance and injury which so many suits would necessarily be to him; this the law will not tolerate or permit. It gives the creditor a remedy against his debtor to enable him to collect his demand and the whole thereof, and it at the same time protects the debtor against needless and vexatious causes of action.

Can this action be maintained against the corporation and a stockholder for the amount of the judgment recovered in the justice's court?

It was argued that the assignees had a right to sue in the assignor's name for that part of the claim assigned to them, and that the constitution and laws gave them the right to bring their action in justice's court; that the process of a justice would not extend and could not be served beyond the bounds of his county, and the stockholders who did not reside in the county could not therefore be reached, and that the remedy given by Sec. 35 of the act of 1877, by its language, was applicable only to courts of record.

The constitution does not prohibit the legislature from giving the circuit courts jurisdiction in cases where the amount claimed is less than one hundred dollars. The constitution, Art. VI, § 18, gives to justices of the peace, in civil cases, exclusive jurisdiction to the amount of one hundred dollars, "*with such exceptions and restrictions as may be provided by law.*" In suits between copartners and for the foreclosure of mortgages, the circuit courts in chancery are given jurisdiction by statute, although the amount in dispute is less than one hundred dollars: 2 Comp. L., § 5059. So the circuit courts were given jurisdiction in claims against boats and vessels irrespective of the amount claimed, and other instances might be given; nor do we think that the language of section 35 will bear the construction contended for by counsel for plaintiff. The section does not in terms exclude justices' courts, but it requires the *clerk of the court* to indorse certain directions to the officer, upon the execution. And it is said that "clerk of the court" here means the circuit court, as there

is no clerk in justice's court. This reference to, or mention of the clerk is merely to the person issuing the execution, which in the circuit would be the clerk. In justice's court, the execution is issued by the justice, who acts as his own clerk, and who, under this statute, would be the proper person to make the required indorsement; and we should require much clearer language than this to warrant us in saying that a justice of the peace would have no jurisdiction in actions sought to be commenced under this statute. The mere fact that the process issued by the justice could not be served upon all the stockholders, is an argument equally pertinent to many cases in the circuit. It is a fact of which this court may well take judicial notice, that very many of the stockholders in our mining corporations are non-residents of this State, and therefore beyond the jurisdiction of the circuit court, in so far as rendering a personal judgment against them is involved. But whether the remedy is ample or not, we are of opinion that justices' courts have jurisdiction in cases commenced under this section; and if anything is lacking to afford parties sufficient relief therein, another department of the government must be resorted to.

Section 35 makes the stockholders individually liable for all labor performed for such corporation, and specifies when and how the liability may be enforced. Suits against the stockholders must be brought within two years from the time when payment for such labor became due, and against the corporation alone at any time within six years. "Suit for such labor may be commenced against any or all the stockholders and the corporation jointly."

In *Hanson v. Donkersley*, 37 Mich. 184, it was held that under the constitution and statute, then in force, the stockholders were not primarily liable for corporation debts for labor.

The individual liability of the stockholders under the constitution means a liability beyond that of members of the corporation, and has no reference to a mere separate or several one. While, therefore, the legislature can not relieve the stockholder from the liability imposed by the constitution, yet it may point out and regulate the manner or method of enforcing the same. Prior to the act of 1877, with certain exceptions, the stockholder could only be held liable after a judg-

ment had been obtained against the corporation, and an execution returned unsatisfied. In other words, the remedy against the corporation must have been first exhausted. Under the present statute a remedy is given against any or all of the stockholders and the corporation jointly, to be commenced within two years, or against the corporation alone at any time within six years. The creditor or laborer has here an option given him, to pursue either the corporation alone, or join one or more of the stockholders with the corporation. Should he sue the corporation and one of the stockholders and recover a judgment, clearly we think he could not afterward commence and maintain an action against the corporation alone, or against it and some other of the stockholders jointly. Having once elected by action and judgment, the party would be bound thereby. Under the old statute two actions were given: first, one against the corporation, then, under certain circumstances, one against the stockholders. Under the present statute a choice of remedies is given: the creditor may elect to pursue the corporation alone, or he may join as defendants with the corporation any or all of the stockholders; but he can not even then proceed against their property by levy and sale upon his execution, until the property of the corporation shall have been exhausted. The property of the corporation is made primarily liable for the labor debts; the individual property of the stockholder secondarily. The policy of the statute can be as effectively carried out against the property of the corporation where the stockholders are joined as where they are not, and the corporation should not be put to the expense of a suit against it alone, and then of a second where joined with one or more of its stockholders.

We are of opinion that where a creditor sues the corporation alone, and recovers a judgment against it, he can not afterward maintain an action against the corporation and the stockholder for the same cause of action. The judgment in the first case, although unsatisfied, would be a bar in the second.

The judgment must be affirmed with costs.

GRAVES and CAMPBELL, JJ., concurred.

COOLEY, J.—I concur in the result.

W. G. THOMPSON ET AL. V. JOHN JEWELL.

(43 Michigan, 240. Supreme Court, 1880.)

Necessary joinder of corporation. An action for labor debts brought under act 113 of 1877, can not be maintained against stockholders, unless joined with the corporation as co-defendants.

Error to Wayne.

Assumpsit. Defendants bring error.

F. A. BAKER and WILLIAM P. WELLS, for plaintiff in error.

MOORE, CANFIELD & WARNER, for defendants in error.

MARSTON, C. J.

Several of the questions raised in this case were considered in *Milroy v. Spurr Mountain Co.*, 43 Mich. 231, decided at the present term.

The remaining question must be answered in the negative. Can an action be maintained against the stockholders of a mining company, when not joined with the corporation, for a labor debt, under the act of 1877?

The remedy given under the act of 1877 is purely statutory and must be followed. The language of the act that "suit for such labor may be commenced against any or all the stockholders, and the corporation jointly" is permissive and optional as to whether any, and, if so, how many of the stockholders shall be included, but is imperative in that they must be joined with the corporation. The levy is not to be made upon the stockholder's property, until that of the corporation shall first be exhausted, and a direction to that effect is required to be indorsed upon the execution. This contemplates an execution against the corporation and stockholders jointly. In *Milroy v. Spurr Mountain Co.*, we held that an action commenced and judgment recovered against the corporation alone, would be a bar to any subsequent action against the stockholders. The same reasons would prevent an action, first, against the

stockholders, to be followed by one against the corporation; and certainly a judgment must be recovered against both, and an effort made to collect from the corporation, before the stockholders' property can be resorted to.

The judgment must be reversed with costs of both courts.

The other justices concurred.

1. Stockholders not liable for corporate debts at common law; such liability, when it accrues, is by statute: *Freeland v. McCullough*, 1 Denio, 414, 43 Am. Dec., 685 and note, 694.

2. A release to one stockholder is a release to all on their personal liability: *Prince v. Lynch*, 38 Cal. 528.

3. Statutory liability of stockholder for wages of servant of corporation for mining etc.: *Horey v. Ten Broeck*, 3 Rob. (N. Y.), 316.

4. Liability of assignor and of assignee of unpaid stock: *Ladd v. Cartwright*, 7 Oregon, 329; *Post Stock*.

5. Innocent purchasers of shares fraudulently issued as fully paid up are not liable for unpaid balance: *Foreman v. Bigelow*, 13 M. R. —

6. Personal liability of stockholders confined to debts contracted while they were such stockholders: *Judson v. Rossie Galena Co.*, 9 Paige Ch., 598.

7. Misrepresentation by a company of men who afterward organize a corporation can not be made a ground of action by creditors of the corporation against its stockholders: *Matthews v. Stanford*, 17 Ga. 543.

8. Liability of trustee for failure to file report pursuant to statute; *Nimmons v. Hennion*, 2 Sweeny (N. Y.), 663; *Nimmons v. Tappan*, Id. 652.

9. Agent contracting on behalf of corporation not personally liable, if contract *ultra vires* as to corporation: *Randall v. Snyder*, 1 Lans. (N. Y.), 163.

10. Statutory liability of directors incurred by allowing corporate indebtedness to exceed three times the actual capital paid in: *Tallmadge v. Fishkill Iron Co.*, 4 Barb. 382.

11. "Liability as a stockholder for a judgment debt of a corporation is not established merely by proof that in the suit in which the judgment was recovered the person sought to be charged as stockholder was summoned and failed to appear:" *Mason v. Cheshire Iron Works*, 4 Allen, 398.

12. Burden upon plaintiff to show that corporation has failed to comply with the requirements of the statute by which omission stockholders are made liable: *Taylor v. New England M. Co.*, 12 M. R. 107.

13. The statement by an officer and stockholder that he believes the corporation is solvent, made in good faith, will not render him personally liable, though the corporation be at the time insolvent: *Searight v. Payne*, 13 M. R. —

14. Transferee of stock not personally liable for assessments: *Franks Oil Co. v. McCleary*, 13 M. R. —

15. Stockholder who has paid in full is liable to creditor of corporation

if other stockholders have not paid their subscriptions: *Kipp v. Bell*, 86 Ill. 577.

16. Liability of stockholders under California constitution: *Larrabee v. Baldwin*, 35 Cal. 155; *Hewlett v. Epstein*, 63 Cal. 184.

17. Liability of stockholder who was not an original subscriber: *Merrimac M. Co. v. Bagley*, 13 M. R. —

18. Subscription for stock implies duty to pay assessments: *Merrimac M. Co. v. Lery*, 13 M. R. —

19. Individual liability of stockholders not enforced under general assumpsit: *Youghiogheny Shaft Co. v. Evans*, 3 M. R. 102.

20. Single creditor can not pursue single stockholder: *Patterson v. Lynde*, 106 U. S. 519.

21. Remedy of creditor who is also a stockholder: *Bailey v. Bancker*, 3 Hill, 188; 38 Am. Dec. 625.

22. Liability of party issuing stock as full paid in purchase of land at excessive valuation who at same time has a collusive interest in such stock: *Langdon v. Fogg*, 18 Fed. 5.

23. Subsequent depreciation of property paid for by stock will not create personal liability: *Coit v. North Car. Co.*, 14 Fed. 12.

24. Stockholder can not be held by creditor who acquiesced in the acts complained of: *Id.*

25. Whether mines were really valued at a certain sum or whether the design was to evade the statute is a question for the jury: *Lake Superior Co. v. Drexel*, 90 N. Y. 87.

26. Effect of omission to state that stock was paid in property: *Bonnell v. Griswold*, 89 N. Y. 122.

27. Creditor's judgment must be general and must be in a court of the State where the remedy is pursued: *Rocky Mt. Bank v. Bliss*, 89 N. Y. 338.

28. A party is not liable before registry where the rules require registry, and an unauthorized registry does not render the person so registered liable as a shareholder: *Thomas v. Clark*, 18 C. B. 662.

29. A suit in equity is the proper remedy to enforce the statutory liability of directors in a South Carolina corporation: *Stone v. Chisolm*, 113 U. S. 302.

30. Strict construction of personal liability act. Judgment roll no evidence of the original debt. A claim in tort is not a debt: *Chase v. Curtis*, 113 U. S. 452; see note, 43 Am. Dec. 694.

See STOCK.

NOBLE V. SYLVESTER.

(42 Vermont, 146. Supreme Court, 1869.)

Rule as to severed personalty. Personal property left on the land for the purpose of being used on the premises, passes with the land by the deed; otherwise with property severed from the realty and intended to be removed.

Application of the rule. A stone split out from the ledge and intended for the construction of a tomb, left lying on the land more than thirty years after sale of the land, *held* the personal property of the vendor.

Parol proof of exception—Continued assertion of claim. Property so severed and converted does not need to be specially excepted in the deed conveying the land; and the fact that a parol exception was made of such stone, was properly shown, as well as the statements of the party claiming to own the stone, when there was nothing in the position of the stone itself, to show whether it belonged to that class of property which would, or of that class which would not, pass under the deed.

Effect of lapse of time—Abandonment. When the property of one man is left upon the premises of another for any length of time, by sufferance without claim by the owner of the soil, the mere lapse of time does not divest the title; nor, if abandoned by the owner, would the chattel necessarily revert to the owner of the freehold.

Trover for a stone. Pleas, the general issue and two special pleas. Replication joining the issue tendered and traversing the special pleas. Trial by jury, May term, 1868, BARRETT, J., presiding.

The defendant averred in his special plea, that prior to the 12th day of April, 1833, the plaintiff owned a piece of land in Bethel, upon which was a rock, and from this rock the plaintiff had loosened the stone in question and moved it a very little; that on said 12th of April, the plaintiff sold and conveyed to one Daniel Wallace said piece of land having said stone thereon as aforesaid, by a warranty deed having the usual covenants of warranty, and made no reservation or exception of said stone in said deed or in the sale of said land; that said Wallace thereupon went into possession of said land and has so remained ever since, and said stone remained as the plaintiff left it for over thirty-two years and until September, 1866, when said Wallace sold it to the defendant, who moved

¹ *Golden v. Glock*, 57 Wis. 118; 46 Am. R. 32.

it off and onto his own premises, and during all this time the plaintiff made no claim to it, but said Wallace always claimed it as his.

The plaintiff's evidence tended to show that he split out said stone with others about thirty-five years ago for the purpose of building a tomb with them; that they were black limestone and in layers about seventeen feet long and five feet wide, and from three to four inches thick; that he tried to take it off but could not with the team he had, but raised it up and propped it a little from the ground; that the plaintiff told Wallace what he got it out for and what he intended to do with it, and reserved it in the sale of the land to him; that the defendant bought it of Wallace and drew it off, and knew at the time, and previously, that the plaintiff claimed it; that the plaintiff never gave up his intention of building a tomb; that the plaintiff had at different times along said to certain persons that he reserved the stone in his sale of the land to Wallace; that plaintiff saw defendant and his men when they went to get it, and forbade their drawing it off, and tending to show its value.

The defendant's evidence tended to sustain the averments in his special pleas. The defendant claimed that the stone could be reserved or excepted only in the deed; but the court held otherwise and allowed the plaintiff to give evidence of a parol reservation of it, to which the defendant excepted. The defendant objected to the plaintiff's proving his own sayings as to the stone after the date of the deed; but the court allowed him to prove them to show that he had not abandoned his claim, to which the defendant excepted.

The defendant insisted that upon the evidence the plaintiff was not entitled to recover; but the court declined so to hold, and *pro forma* left the case to the jury to find whether the plaintiff did with the stone as his evidence tended to show, and whether there was a parol exception of the stone at the time of the conveyance of the land understood between the parties to the deed and consented to by Wallace; instructing them that if they should so find, the plaintiff would be entitled to recover; and left it to them to find the facts upon the evidence without commenting thereon or giving them any charge on any other point, except as to the rule of damages, to which the defendant excepted.

HUNTON & GILMAN, for the defendant.

JAMES J. WILSON, for the plaintiff.

The opinion of the court was delivered by PIERPONT, C. J.

It appears from the cause, that the stone in controversy was split out and removed from its original connection and position in the ledge, and laid up preparatory to its removal from the farm on which it was originally situated. This was done by the plaintiff, who was then the owner of the farm, and the object of splitting it out and putting it in such position was to remove it from the farm and use it in the construction of a tomb. This being the case, the stone may be regarded as being governed by the same principles that are applicable to timber, fence rails and the like, that have been removed from the freehold in fact, but remain upon the premises for the purpose of being used there in the construction of fences, etc., and if on the land at the time the premises are conveyed they will pass by the deed, but if they are there not for the purpose of being used upon the premises, but to be removed elsewhere, then they do not pass by the deed. So of this stone. It having been severed from the freehold for the purpose of removing it from the premises, to be used for a specific purpose elsewhere, we think it would not necessarily pass by the deed; but as there was nothing about the stone, or the position in which it was placed, to indicate the use to which it was to be put, whether for fencing or underpinning, or the like, upon the premises, or for use elsewhere, it was a proper subject of explanation between the plaintiff and Wallace, at the time the deed was executed, and such explanation might well be by parol; it was not an exception of that which would otherwise pass by the deed, but the giving to Wallace a knowledge of facts showing that it would not pass, and thus avoiding all misunderstanding or controversy about it in the future. The fact that such information was accompanied by an exception in form does not vary the principle. We think there was no error in admitting the parol testimony. And in submitting the question to the jury whether there was a parol exception or not, if there was error, it is not an error of which the defendant has any right to

complain, as it was putting the case, in this respect, in quite as favorable a light as he could legally claim.

We think it was not error in the court to allow the plaintiff to show his own sayings in respect to his ownership of the stone made after the deed to Wallace, not for the purpose of proving what took place between him and Wallace at the time the deed was made, but for the purpose of showing that he had not abandoned the property, inasmuch as the defendant in his pleadings and proof sets up the fact that the plaintiff had permitted the stone to remain where it was when the deed was executed, up to the time the defendant took it away, as one ground of defense, and we are to assume that the court, in admitting the testimony for that special purpose, took care that the jury should understand that they were not to use, or regard it, for any other.

But it is insisted that even if the plaintiff did retain the property in this stone, so that the title did not pass to Wallace, still he has lost his right to it by suffering it to remain on the premises of Wallace down to the time it was sold to the defendant, and he took it away.

The jury have found that the stone was excepted in the sale, and remained the property of the plaintiff; that it was left upon the premises with the knowledge and assent of Wallace, and remained there over thirty years before the defendant purchased it of Wallace. The case shows that Wallace never interfered with the stone in any manner, never made any claim to it, never objected to its remaining there, or ever requested the plaintiff to remove it, but suffered it to remain there just as it was left when the deed was executed. The defendant now claims that the title to this stone became vested in Wallace by lapse of time, and we are called upon by his counsel to say, if thirty years under such circumstances is not sufficient to change the title, what time is sufficient? We do not feel called upon to give a definite answer to that question; but we feel safe in saying when the property of one man is left upon the premises of another, with the knowledge and assent of the owner of such premises, that so long as such owner suffers such property to remain upon his premises, without objection or request to remove it, exercising no act of ownership over it and making no claim to it, just so long the title to the

property remains the same, and is not divested from the one and vested in the other by mere lapse of time.

Wallace never was the owner of this stone, and if the plaintiff had abandoned it, it would not necessarily revert to Wallace; but the case does not show an abandonment, and it does not appear to have been put upon that ground at the trial below.

The lapse of time was an element proper to be considered by the jury in determining the question submitted by them, and it is claimed that the county court erred in not giving the jury special instructions in respect to it. It does not appear that there was any controversy upon the trial as to the propriety of their considering it, and there was no request from either side that the court should give any specific charge upon it. The evidence upon this point, as upon all others, was submitted to the jury; it was doubtless commented upon by the counsel on both sides in their arguments, and we have no reason to suppose it was not duly considered and weighed by the jury. Under the circumstances it was no more error to omit to refer to this particular piece of testimony, than it was not to refer to any or every piece of testimony put in on either side; and it has never been regarded the legal duty of the court to refer specifically to each and every piece of testimony in the case in the charge, especially when there is no such request. We find no error in the trial below.

The judgment of the county court is affirmed.

BAKER V. CHASE.

(55 New Hampshire, 61. Supreme Court of Judicature, 1874.)

¹ A man's belief is a condition of his mind and can not affect the title to his property.

Title to personalty by limitation. In order that the title to personalty may pass by the Statute of Limitations, there must be some act of dominion over it inconsistent with the right of the original owner, asserted by the party claiming the benefit of the statute.

Split stone lying on land, sold during statutory period. In 1861, plaintiff bought a piece of land on which were lying some split stone belong-

¹ *Vice v. Anson*, 11 M. R. 244.

ing to a third party. They remained there untouched without assertion of title thereto by any party until six or eight years after the conveyance, when the owner entered and removed them. *Held*, that they remained the property of the original owner in the absence of any conversion or assertion of dominion by the vendee of the land in the meantime.

Right to remove personalty from land granted. The vendor of land on which remains some of his personal property, or the vendee of such personal property, has a right to a reasonable time in which to enter and remove the same; and if he delay beyond a reasonable time he is liable to nominal damages for his entry for such purpose.

Trespass *quare clausum* by James Baker against Amos Chase for entering the plaintiff's close and carrying away stone. Tried by the court as upon the general issue, and a special plea. In 1848, Enoch Gove, owning a farm, verbally agreed with the defendant's father to sell him a large rock, or all he wished to quarry from it, for five dollars. The five dollars was paid, and the defendant's father and the defendant agreed that they would split out the stone jointly and each have a part, the defendant's father to take what he wanted for the underpinning of a house he was building, and the defendant to have the rest. A number of men were employed by them more than a week splitting out the stone, Enoch Gove and his sons assisting, "changing works" with the defendant, who assisted Enoch in splitting out stone in other places on the farm for Enoch's use. The defendant's father hauled away all he wanted, and the defendant hauled away all he then had occasion to use, leaving the three split out, for the removal of which, in 1872, this suit is brought. Two of the three were split for door-steps, each nine and a half feet long and three feet wide; the other for underpinning, seven feet long and eighteen inches wide; two were drawn a few feet, and the other was moved a little, and sticks or stones put under them, in 1848, when they were split; and they were not afterward moved till the defendant carried them away in 1872. The defendant hauled away some that he had split out two or three years after 1848. He has always understood that the three were his; but, after he took some in 1850 or 1851, he neither did nor said anything to set up any claim to those that were left until six or eight years after the defendant bought the land, when the defendant and the plaintiff both claimed them. Enoch Gove died

about twenty-five years ago, leaving the farm to his children, and, in their division of it, the part upon which the stone were, passed to William H. and Levi, who conveyed it to the plaintiff in April, 1831. The plaintiff knew that the stone were split by the defendant and his father.

The plaintiff hauled some that were spilt at the same place in 1848, for the underpinning of the house of the defendant's father, and hauled one that the defendant's brother had. No stone were reserved in the plaintiff's deed, and nothing was said about stone when he bought the farm. There was no evidence that Enoch Gove or his children ever said or did anything about the stone by way of claiming or disclaiming them, except what is stated in this case. The question of the ownership of the stone did not occur to his children while they owned the farm, or when they sold it. They had no opinion, belief, understanding, or thought on the subject. The plaintiff testified that he supposed he bought the stone with the farm. The defendant's entry to remove the three stones was without the plaintiff's consent. The defendant applied to the plaintiff to know whether he would object, and the plaintiff made no answer, except to claim the stones as his. The damage done by the defendant's entry was nominal. The three stones, when carried away by the defendant, were worth \$20. Judgment is to be rendered by the whole court, drawing such conclusions of law and fact as the foregoing facts seem to them to warrant.

MORRISON, STANLEY & HILAND, for the plaintiff.

BRIGGS & HUSE, for the defendant.

LADD, J.

The court are to draw such conclusions of fact as well as law, as the facts stated in the case seem to warrant. I think the facts stated warrant the conclusion that the plaintiff, in 1848, knew that the property in the stones, about which the controversy has arisen, passed out of Enoch Gove; and it is very probable that he also knew at that time all the terms of the bargain, as well between the defendant's father and

Gove as between the defendant and his father. It is enough, however, that he knew the stones then ceased to be the property of Enoch Gove, and, of course, that they ceased to be part of the realty. It is of no consequence whether he supposed or did not suppose they passed by the deed of Wm. H. and Levi Gove to him. Having once had imposed upon them the character of chattels by being split out and moved, they did not pass by that deed, whatever the parties may have supposed, unless something had been done in the meantime, to clothe them again with their original character of real estate. What had happened to them? The case shows nothing at all. They had not been appropriated to any use, or moved from the spot where they were originally left. The owners of the farm had never said or done anything by way of asserting a claim to them or otherwise. So I find that, at the time of the deed from Wm. H. and Levi Gove to the plaintiff, they were chattels, and did not pass by that deed.

Then comes the question whether they have become the property of the plaintiff by anything that has happened or failed to happen, that is, by anything that has been done or omitted by the parties since the plaintiff became the owner of the soil, on which they have been allowed to rest. For six or eight years after the deed, nothing was done or said by either party in reference to them. Each supposed himself to be the owner; but this was merely a condition of mind, a mental state, by which, I apprehend, no rights could be gained by either against the other. To be sure, the belief as to his ownership entertained by each might be a reason why nothing was done by either in the way of asserting his supposed rights. Such a belief, however, could not affect the title.

But the plaintiff had possession of the land, and the stones lay upon it, and this state of things continued six years or more before anything was done or even said between the parties as to their ownership; thereupon the plaintiff contends that, by some application of the Statute of Limitations, they became his property. I think that is not so. Undoubtedly the Statute of Limitations is now regarded as one of repose, and if chattels come in to the possession of one not the owner, he may, without question, be thereby quieted in their enjoyment. But I think, in order that the statute should have

such effect, there must be some act of appropriation, some use or enjoyment of the thing, such as would lay the foundation of an action for its recovery in favor of the owner.

It is true the defendant slept on his rights for a very long time. And, if his property had been of a kind to yield to the assaults of the elements, he would probably have thus been saved the trouble and expense of the present litigation; but the stones were indestructible, and the precise question now is, not whether the defendant has lost them by his long repose, but, whether the plaintiff has gained them since he went into possession of the land under his deed in 1861.

There is room to argue that, inasmuch as the plaintiff knew the stones became personal property in 1848, and that the title to them then passed out of Enoch Gove, the ancestor of his grantors, his quietly allowing them to remain, as he did, where they were left, amounted to a license to the owner to store them there, which would be good until revoked; and if that was so, the owner would doubtless be entitled to a reasonable time after such license was revoked in which to remove them: *Cornish v. Stubbs*, Law Rep., 5 C. P. 334; *Mellor v. Watkins*, L. R., 9 Q. B. 400. I put my opinion, however, on the ground already stated, that the title to chattels will not pass by operation of the Statute of Limitations unless there be some act of dominion or use on the part of the possessor inconsistent with an absolute right of property in the owner.

But I think the utmost that can be said with respect to the defendant's right to enter upon the plaintiff's land for the purpose of removing the stones, admitting that such right, as against the plaintiff, ever existed, is, that he must do so within a reasonable time after the dispute about the ownership in 1867 or 1869. It seems to me five or even three years was not a reasonable time, and for this reason I am of opinion, the plaintiff is entitled to judgment for nominal damages only.

CUSHING, C. J.—Assuming that Gove, the ancestor, licensed the defendant to let the stones remain upon his land, that license would be revoked by the death of the ancestor and the descent of the land; and so, if the younger Goves had licensed the defendant to let the stones remain upon the land,

their conveyance of the land to the plaintiff would be a revocation of the license. But such revocation of the license would not deprive the defendant of his right of property. He would be entitled to a reasonable time to remove it: 1 Wash. on Real Prop. 549, 550.

It is apparent, from the facts stated in the case, that it was no inconvenience and no appreciable pecuniary damage to any of the land owners to let the stones remain upon the land, and it could not be unreasonable for the defendant to let them lie there so long as the land owners gave no sign of being disturbed. So soon, however, as the defendant had notice that the plaintiff was claiming to be the owner of the stones, he might well enough understand that his acquiescence in their remaining upon his land was the result of his claim of ownership, and not of his accommodating disposition, and it would then behoove him not to sleep too long upon his rights. On the whole, I am inclined to think that he did not get off the stones in a reasonable time.

It is well enough settled that the Statute of Limitations does not begin to run until a right of action has accrued, and no right of action could accrue in this case until the plaintiff had done some act, or at least made some claim, inconsistent with the ownership of the defendant. No such act or claim is shown until less than six years before the defendant took away the stones. The statute, therefore, had not run so long as to bar the right of action of the defendant, and, of course, could not have quieted the title of the plaintiff. There must be judgment for the plaintiff for nominal damages.

SMITH, J.—These stones remained the property of Chase, although he may have neglected to remove them within a reasonable time: *Hoit v. Stratton Mills*, 54 N. H. 452. Chase, having omitted to remove them within a reasonable time, is liable for the damage to the land of Baker, occasioned by his entry, to remove them, but not for the value of the stones.

The case finds that the damage done by the defendant's entry was nominal. There must therefore be

Judgment for the plaintiff for one cent damages.

1. An oil lease is a chattel real: *Vandergrift's App.*, 9 M. R. 397.
2. The severance from the realty, not the owner's consent to the severance, makes the thing severed personal property: *Riley v. Boston Water Co.*, 11 Cush. 11.
3. Shares in companies are personalty: *Tredinnick v. Oliver*, 5 H. & N. 780; *Hayter v. Tucker*, 4 Kay & J. 243; *Walker v. Bartlett*, 18 C. B. 844; 17 Id. 446.
4. Stone sold and moved to another part of the premises are personalty: *Fulton v. Norton*, 64 Me. 410.
5. Coal broken becomes personalty though left in the run: *Lykens Valley Co. v. Dock*, 8 M. R. 570; see *McLean Co. v. Lennon*, 10 M. R. 277; *Morgan v. Powell*, Id. 79.

BAKER V. HOWELL.

(6 Sergeant & Rawle, 476. Supreme Court, Pennsylvania, 1821.)

¹ **Assumpsit—Title to realty disputed.** Assumpsit for money had and received will not lie for the price of sand taken and sold from a sand bar to which both plaintiff and defendant claim title.

Error to the District Court for the City and County of Philadelphia.

The declaration was in *assumpsit*, for money had and received. The pleas were *non assumpsit* and payment. On the trial a verdict was taken for the plaintiff, subject to the opinion of the court upon the facts stated in the following case, which was agreed to be considered as a special verdict.

The plaintiff and defendant are both inhabitants of the county of Philadelphia.

By deed bearing date May 2, 1801, William Smith and wife and Richard Smith and wife, of New Jersey, conveyed to the plaintiff, in fee simple, an island, or mud flat, in the river Delaware, near the upper end of Petty's Island, and within the limits and jurisdiction of the State of New Jersey. Under this deed the plaintiff claimed title to a sand bar adjacent to the said island, or mud flat, as part of the land conveyed by the said deed.

The defendant had a lease of the said sand bar, dated November 9, 1813, from a certain Hugh Hatch, of New Jersey, who claimed title to the said sand bar by virtue of a deed from Charles Ellis, of New Jersey, dated June 2, 1810, and a warrant and survey of the same date.

For ten years and more prior to the commencement of this suit, and during its continuance, the plaintiff had fished on the said island, and had taken and sold sand from the said bar. The title to the said sand bar, and the possession thereof, for ten years prior to the commencement of this suit, are found to be in the plaintiff.

The defendant had, from time to time, prior to and during the years 1814 and 1815, taken sand from the said bar, claim-

¹ *Harlan v. Harlan*, 15 Pa. St. 507.

ing a right to take the same under his said lease. The sand thus taken was brought by the defendant to the county of Philadelphia, and there sold by him. This action is brought to recover the proceeds of the said sale.

The defendant had, at different times, both before and after this suit was brought, paid the plaintiff for sand taken by him from the said bar; and on the 11th November, 1814, he paid the said Hugh Hatch fifty-five dollars for sand taken from the said bar under the said lease.

If, upon these facts, the court shall be of opinion that the present action will lie, judgment to be entered for the plaintiff in the sum of \$237.67, with interest; if otherwise, judgment to be entered for the defendant.

The court below decided that the action would not lie, and the plaintiff removed the cause by writ of error.

E. S. SERGEANT and S. LEVY, for the plaintiff in error.

WHARTON and RAWLE, Jun., for the defendant in error.

DUNCAN, J., delivered the opinion of the court.

An action of *assumpsit* for money had and received, is not a form of action in which conflicting titles to land, or the right of inheritance, can be tried: *Lady Windsor's Case*, 4 Burr. 1985. Trover would not lie for entering into the lands of another, digging up and carrying away his ground: *Mather v. Trinity Church*, 3 Serg. & Rawle, 509. The cause of action, as found by this special verdict, is trespass *quare clausum fregit*; the defense of the defendant was, that the close was his freehold. Contract is not found by the verdict; nor could it be implied from the facts found; nor could the court draw a conclusion from facts found, for it is nothing more or less than entering into the land and possession of the plaintiff, digging up and carrying away his sand and selling it, under an assumed claim of right. It would be strange to convert this trespasser into an agent, and sue him as a bailiff and recover the money he received for the sand. This subject is fully considered in *Mather v. Trinity Church*, which can not be distinguished from the present case; for, if trover would lie

for the conversion, assumpsit would for the fruits arising from it by a sale and conversion into money. It is not in the power of a party to change a local into a transitory action, and try the title to land in another county *ex directo*, where the right to the land is the very foundation of the plaintiff's action. The controversy was one of a title claimed by the plaintiff and defendant under different grants from the State of New Jersey. If the right could be determined in this form of action, and the verdict should be for the plaintiff, this verdict could be given in evidence in an ejectment brought in Jersey, and would conclusively entitle the plaintiff to recover; and so, if for the defendant, he could recover on the strength of this verdict. This is stronger than the case of Trinity Church; for here must be decided between these parties their right to land in another State. If this could be supported, then a title to lands in England, for coals dug from another's land in that country, and transported to this country, and sold here, could be tried here. A construction of a will of lands; the sanity of a testator; the legitimacy of one claiming as heir. It involved a naked question of title; was a contest between plaintiff and defendant, in which the sole matter in issue was a right to lands in Jersey; the only controversy respected their original titles; it was not a contract out of which the question of title to land grew; it was not a personal contract, which would give a court jurisdiction wherever the defendant might be found, for then the circumstance that a question of title may be involved in the inquiry, and even constitute the essential point on which the case depends, would not arrest the jurisdiction of the court. The district court had no original jurisdiction on the direct question of the rights of these parties; and, therefore, on this special verdict, judgment must be entered for the defendant in the original action.

Judgment affirmed.

FIRMSTONE ET AL. V. WHEELEY ET AL.

(2 Dowling & L., 203. Queen's Bench, 1844.)

Case for removing barriers; declaration looking to consequential damages upheld. A declaration stated that plaintiffs and defendants were owners of adjacent mines; that defendants had trespassed on plaintiffs' mine and had carried away a quantity of coal; that water had arisen, against which, but for the trespass of the plaintiffs, the coal would have been a sufficient barrier; that thereupon it became and was the duty of the defendants to prevent the water in their mine from flowing into the plaintiffs' mine; yet the defendants neglected their said duty, whereby the water flowed into the plaintiffs' mine and prevented them from working the same. *Held* on general demurrer, a good count in case.

Case. The declaration stated that before and at the time of the committing of the grievances, etc., the defendants were owners of, and in possession of a certain mine, to wit, a coal mine; and the plaintiffs were then also owners of, and in possession of a certain other coal mine, and the said coal mines of the plaintiffs and defendants respectively, were then and are, and always have been, next, adjacent, and contiguous to, and abutting upon one another; that the defendants so being the owners of and in possession of the said coal mine, for a long time previously to the committing of the grievances, had, on a certain day and year before the committing of the said grievances, to wit, on, etc., trespassed upon the mine of the plaintiffs, and had then dug out and carried away from the mine of the plaintiffs divers large quantities of the said mine, to wit, of coals; that after the committing by the defendants of the last mentioned trespasses, divers large quantities of water had arisen, accumulated, and flowed together in and upon the mine of the defendants, and which said water would, and from the relative position of the mines of the plaintiffs and defendants respectively, necessarily must (and as is hereinafter mentioned, did in fact), flow down upon, flow into, flood, and inundate the mine of the plaintiffs, except and unless a good and sufficient barrier, dam or other appropriate impediment, or means of confining the said large quantities of water and preventing them from so flowing down upon, etc., the mine of the plaintiffs,

existed, or had been, or were taken, provided, or made use of in that behalf; that the defendants had by their said trespasses, got, dug out, carried away and disposed of divers large quantities of the said mine of the plaintiffs, to wit, of the coals thereof, which, but for the said trespasses, would have been suffered to remain and form, constitute, continue, and be, and the plaintiffs say that but for the trespasses last aforesaid, they, the plaintiffs, would have suffered and permitted the last mentioned quantities of the said mine to remain, and form, constitute, continue, and be, and the same would in fact have remained, and formed, constituted, and been, a good and sufficient and in every respect an ample barrier and means for preventing the said large quantities of water so accumulated and flowed together, in and upon the mine of the defendants, from flowing down upon, flowing into, flooding or inundating the mine of the plaintiffs; that the defendants having committed the said trespasses, and having then thereby destroyed, removed and carried away the said barrier, dam, and means then theretofore existing for preventing the said large quantities of water so accumulated and flowed together, and from time to time accumulating and flowing together in and upon the mine of the defendants, from flowing down upon, flowing into, inundating and flooding the mine of the plaintiffs, and having by means of the aforesaid trespasses deprived the plaintiffs of the only barrier, dam, or means of preventing the said large quantities of water accumulated and flowed together in and upon the mine of the defendants from flowing down upon, flowing into, accumulating and flooding the mine of the plaintiffs (averment of notice), it then thereupon became and was the duty of the defendants to make such provision, and, to take such means, and so to manage, confine and dispose of the water so accumulated and flowed together in and upon the mine of them, the defendants, after the committing by them, the defendants, of the trespasses hereinbefore mentioned, and from time to time thereafter accumulating and flowing together in and upon the mine of the defendants, (and which, but for the committing of the said trespasses by the defendants as aforesaid, would by the said large quantities of the said mine of the plaintiffs, to wit, of the coals thereof, which had been by the defendants got, dug out, and carried away and disposed of as aforesaid, have been altogether pre

vented and impeded from flowing down upon, flowing into, flooding or inundating the mine of the plaintiffs,) that none of the water so accumulated and flowed together in and upon the mine of the defendants, after the committing by the defendants of the trespasses hereinbefore mentioned, or at any time thereafter to accumulate or flow together from time to time in and upon the mine of them, the defendants, should flow down upon, flow into, flood or inundate the mine of the plaintiffs. Yet, the plaintiffs say, that although after the committing by the defendants of the said trespasses, and after full knowledge and notice of the premises had come to and been received by the defendants, divers and very large quantities of water, (which, but for the committing of the last mentioned trespasses would have been, so impeded and prevented as is hereinbefore in that behalf mentioned,) flowed together and accumulated in and upon the mine of the defendants, and although the defendants might and could, and ought to have taken such means and made such provision, and so to have managed, confined and disposed of the said last mentioned water, that the same might not flow down upon, flow into, flood or inundate the said mine of the plaintiffs, and although the defendants did, for a short period and to a small extent, perform their duty in that behalf, nevertheless the plaintiffs say, that they, the defendants, have so failed and neglected to perform the said duty and have so broken the same, that except as aforesaid, they have wholly failed and neglected to make any provision, or to take or provide any means whatever, or in any way whatever to manage, confine or dispose of the said last mentioned water, so that the same might not, nor might, nor should any part thereof flow down upon, flow into, and flood or inundate the said mine of the plaintiffs; that by means and through the defendants' said breach of duty, and not otherwise, divers large quantities, to wit, fifty millions of gallons of the said water so accumulated, and from time to time accumulating and flowing together in and upon the said mine of the defendants, since the committing by them of the said trespasses aforesaid, and which, but for the committing of the said trespasses by the defendants as aforesaid, would, by the said large quantities of the said mine of the plaintiffs, to wit, of the coals thereof, so by the defendants got, dug out, and carried

away and disposed of as aforesaid, (the same being so, as aforesaid, the only barrier, dam, or means reasonably appropriate and sufficient in that behalf,) have been altogether prevented and impeded from flowing down upon, flowing into, flooding or inundating the said mine of the plaintiffs; on a certain day and year after the committing of the said trespasses, and on divers other days, etc., wrongfully and injuriously flowed down upon, flowed into, inundated and flooded the mine of the plaintiffs, and then wholly prevented the plaintiffs from working the said mine, etc.

General demurrer and joinder.

ALEXANDER, in support of the demurrer.—The declaration, both in form and in substance, is in case; but the grievance complained of is properly the subject of an action of trespass. In an action for the former trespass, the plaintiffs might have recovered full satisfaction for the damage now complained of. If it be said that this is an informal count in trespass, the declaration is nevertheless bad; for it relies upon an act of non-feasance; and for that no action will lie, unless there be a breach of duty. In this case, there was no obligation on the defendants to protect the plaintiffs: *Peyton v. Mayor of London*, 9 B. & C. 725; 4 M. & R. 625; *Chadwick v. Trower*, 6 Bing. (N. C.) 1; 8 Scott, 1. If the present grievance be treated as a continuing trespass, the form of action is trespass: *Holmes v. Wilson*, 10 A. & E. 503. A judgment recovered in the present case would be no bar to an action in respect of the original trespass. It is difficult to see how the defendants could plead to this declaration. They could not traverse the duty, nor could they deny the original trespass. *Ingram v. Lawson*, 9 C. & P. 326, 2 M. & R. 253, and *Hodson v. Stallebrass*, 11 A. & E. 301, 3 P. & D. 200, 8 Dowl. 482, are authorities to show that the plaintiffs might have recovered prospective damages in an action for the original trespass. The defendants had no right to enter the plaintiffs' mine in order to prevent the water from overflowing: *Jones v. Williams*, 11 M. & W. 176. [POLLOCK, C. B.—I do not see why the defendants can not traverse the foundation of the duty. It is similar to the case of a carrier or a coachmaster; if the duty is alleged to be the result of the relation

in which the parties stand to each other, the party charged must have a right to traverse it.] In that case the form of action should have been trespass. [POLLOCK, C. B.—Suppose a person digs so near a highway as to render it dangerous, unless fenced by day and lighted by night; that might be a trespass to the soil for which the lord of the manor, or owner of the land, could maintain trespass; but there being also a duty to guard the public, a person injured would have a right to sue in case.] Such right would arise in respect of the violation of a public duty; but in this case there is no obligation on the defendants to remove the water from their own mine. In *Walton v. Waterhouse*, 2 Wms. Saund. p. 442, n. 2, it is said: “There is a distinction between a duty created by law and one created by the party; for, when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him: as in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused; so in escape, if a prison be destroyed by tempest or enemies, the gaoler is excused: 33 Hen. VI, c. 1; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. [ALDERSON, B.—Here is a quantity of water in the defendant’s mine, which it is his duty to prevent from flowing to the plaintiffs’ mine, and the reason alleged is, that the defendants have removed the bar. The defendants ought, therefore, to take reasonable precautions to keep out the water.] The injury is the result of a continuing trespass.

PEACOCK, *contra*.—First, the declaration shows a duty cast on the defendants by reason of their wrongful act. It appears that the barrier would have been sufficient to protect the plaintiffs, and that the defendants committed a trespass in removing it. The case may be tested by reference to the law respecting fences. When two persons are owners of adjoining lands, neither is bound to fence his own land, but each is bound to take care that his cattle do not wander from his land and trespass on the land of the other: *Boyle v. Tamlyn*, 6 B. & C. 329; see S. C., 9 D. & R. 430. But suppose each of the adjoining lands had fences, and the one party wrongfully cuts

down the other's fence, an obligation would be cast on the party having so trespassed, not to cut his own fence or to keep his cattle from straying; and if the other's cattle strayed, the former could not have impounded them, by reason of his having committed a wrongful act in destroying the fence. Secondly, the plaintiffs may maintain case for the consequential damage arising from the trespass alleged in the declaration. In *Scott v. Shepherd*, 2 W. Bl. 897 (see S. C., 3 Wils. 403), Blackstone, J., says: "Every action of trespass with a '*per quod*,' includes an action on the case. I may bring trespass for the immediate injury, and subjoin a '*per quod*' for the consequential damages; or may bring case for the consequential damages, and pass over the immediate injury." If trespass had been brought for the injury now complained of, an action of trespass for the original damage might have been pleaded in answer. In *Sutton v. Clarke*, 1 Marsh. 440 (see S. C. 6 Taunt. 29), Gibbs, C. J., in declaring judgment, says: "This case is perfectly unlike that of an individual who makes an improvement on his own land, from which an injury eventually accrues to another; such person must answer for the injury, because he was acting for his own benefit." *A fortiori*, if the damage results from injury to his neighbor's land. A former highway act directed that all actions against persons for anything done or acted in pursuance thereof should be commenced within three calendar months after the fact committed. Yet where surveyors of highways undermined a wall, which did not fall until three months afterward, it was held that they were liable to an action on the case, for the consequential injury, within three months after the falling of the wall: *Roberts v. Read*, 16 East, 215. Where there is an injury to the reversion, or a consequential damage, case may be maintained, though the original act was a trespass: *Harris v. Ryding*, 5 M. & W. 60; *Raine v. Alderson*, 4 Bing. N. C. 702; 6 Scott, 691; *Wells v. Ody*, 1 M. & W. 452; 5 Dowl. 95; *Leame v. Bray*, 3 East, 593; *Blyth v. Topham*, Cro. Jac. 158. But assuming that this is not a good count in case, it is, at all events, an informal count in trespass. And as the defendants have not demurred specially, any cause of action in trespass will support the count: *Hudson v. Nicholson*, 5 M. & W. 437.

POLLOCK, C. B.—The substance of the complaint is, that the defendants have removed the only barrier between the mines; and that, therefore, it became their duty so to deal with the water accumulating in their mine, as to prevent it flowing into the mine of the plaintiffs. There may, perhaps, be a difference, as regards the law, between the barrier of a mine and a fence above ground. If a wall is knocked down, the owner may maintain an action for the trespass; but he can not, by omitting to rebuild it, hold the defendant always responsible for any consequential damage. But here, the plaintiffs say that the removal of the barrier is irreparable, and therefore the duty alleged in this declaration may well arise. The defendants may amend by withdrawing their demurrer on the usual terms, unless the plaintiffs think fit to amend the declaration.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Judgment accordingly.

LAIRD ET AL. V. BOYLE ET AL.

(2 Wisconsin, 431. Supreme Court, 1853.)

Parties to bill for injunction—Parting with their interest before decree.

Parties in interest must be before the court, and where the complainants' lessees of a lead mine, had procured a temporary injunction to restrain the defendants from working the leased premises, and before the final hearing the lease had expired and had not been renewed, and the lessor had sold his interest in the premises, it was held error to decree a perpetual injunction without first bringing in the real parties in interest.

The case must support the specific relief prayed for. When some specific relief is prayed, and is not accompanied with a prayer for general relief, if the whole case made will not justify the granting of the particular relief applied for, the bill must be dismissed, although the complainant may have been entitled to some other aid.

The bill filed in this case charges the defendants with trespass and waste upon a certain lot of land in the possession of the complainants as lessees, by digging and taking lead ore thereout, and converting the same to their own use. An in-

junction was prayed for and granted, and the defendant Boyle answered, denying the material charges of the bill.

The cause being submitted on replication filed, the court decreed that the defendants should be perpetually enjoined from interfering with the rights of the complainants.

To reverse this decree the defendants appeal to this court.

DUNN, COLLINS & SMITH, for appellees.

J. H. KNOWLTON, for appellants.

By the Court, CRAWFORD, J.

The bill of complaint in this case was filed to obtain a writ of injunction to restrain the defendants from committing waste upon a certain lot of land in the possession of the complainants, as lessees of Daniel G. Whitney. The land is situate in the county of La Fayette, and was held and enjoyed by the complainants, at the time of the filing of the bill, for the purpose of mining for lead ore thereon. The right of the complainants to the occupancy and use of the lot was derived from a lease given to them by the above named Whitney, by his attorney in fact, John Burrell, which lease was to continue for the term of one year from the date thereof, subject to be renewed, provided the land did not "change owners." The date of the lease was the 26th day of January, 1850, and the bill of complaint was filed on the 15th day of April next thereafter. The material charge in the bill is, that the defendants had before that time illegally entered upon the lot in question and had taken away and disposed of large quantities of lead ore from the "diggings" of the complainants, and were then engaged in illegally removing, and converting to their own use, large quantities of lead ore of great value, to the great injury of the complainants.

The prayer of the bill was for a writ of injunction to stay and prevent the commission of further "waste and spoil" on the premises and that the same, on a final hearing, might be made perpetual.

The court commissioner of La Fayette county allowed a writ of injunction, as prayed for, which was issued.

The defendant, Thomas Boyle, filed an answer denying the material charge of the bill, and the other defendants, Tierney, Harkin and Meloy, being severally under the age of twenty-one years, put in the usual answer by their guardian *ad litem*. A replication to these answers was filed, and the cause was heard in the Circuit Court of the County of La Fayette at the October term, 1851, and at the March term, 1852, a decree was rendered, declaring the complainants to be the lessees of the lot described in the bill of complaint, and perpetually enjoining the defendants from interfering with or molesting the complainants in the enjoyment of the said lot.

The proofs submitted on the hearing, whatever they may have been, have not been preserved or returned to this court, but a stipulation as to the facts proved at the hearing has been signed and filed here, from which we find that during the continuance of the lease to the complainants, the defendants did enter upon the premises, and dig and take lead ore therefrom, and convert the same to their own use; that Burrell, the attorney in fact of Whitney, had, during the year 1850, and within the term specified in the lease, purchased the tract of land on which this mining lot was situated, from Whitney, and was, at the time of the hearing, the owner of said land; that he (Burrell) had not, since the 26th day of January, 1851, received any rent from the complainants, or either of them, and since that date had not recognized or treated them, or any of them, as tenants, or as having any right on said land; that the lease to the complainants had not been renewed, and he did not intend to renew it.

Independent of the objection that many of the material averments in the bill, which are admitted by the answer of the defendant Boyle, are entirely without proof as against the infant defendants, we can find nothing in the case to sustain the decree of the court below. At the time of the filing of the bill, these complainants were lessees of the premises, but before the cause was brought to a hearing, their character of lessees had ceased, and they had, at the time of the hearing, no right or interest in the premises whatever, as appeared from the testimony of the owner of the soil. It is true the lease contained a provision for renewal, but upon what terms and for what length of time the lease should be renewed, it is alto-

gether silent, and we think that this provision or covenant is void for uncertainty, as it appears in the lease, and there is nothing in the evidence before us which enables us to render it certain. This principle is fully discussed and established in the following cases: *Blagden v. Bradbear*, 12 Vesey, 466; *Clinan et al. v. Cooke et al.*, 1 Sch. & Lef. 22; *Bromley v. Jeffries*, 2 Verm. 415; *Bailey et al. v. Ogden et al.*, 3 John. 399; *Clerk v. Wright*, 1 Atk. 12.

Besides, the renewal was to depend on the fact of the ownership of the land remaining unchanged, and the proof shows that the land has been sold and conveyed by the lessor, Whitney, to the witness, Burrell, during the term for which the lease was granted.

The question, then, is whether the complainants are entitled to the relief which is prayed for in the bill, when it is shown that they have ceased to have any interest in the premises to which the injunction extended. While they were lessees, they might, in a proper case, invoke the protection of a court of equity to prevent waste or irreparable injury; but when not only the defendants, but the complainants themselves, have no right, title or interest whatever in the land covered by the injunction, it would, we think, be a useless application—nay, a prostitution of the powers of the court. The complainants have no rights to be invaded or protected, although, when the bill was filed, they had such rights.

The general rule is, that the parties really in interest must be before the court; and if a complainant, or complainants, if there be more than one, after the commencement of the suit parts with his or their interest in the subject, by assignment or otherwise, the suit can not be proceeded in until the proper parties are brought in, if the objection be urged: *Williams v. Kinder*, 4 Vesey, 387. The defendant, in such case, may apply to the court for an order that the assignee or party in interest file a supplemental bill in the nature of a bill of review by a certain day, or in default thereof that the bill be dismissed: *Garr v. Gomez*, 9 Wend. 649.

We are satisfied that in this case the court should not have rendered a decree perpetuating the injunction, and it could have rendered no other relief, because that was the specific relief prayed for; and the rule is well settled, that when some

specific relief is prayed, and is not accompanied with a prayer for general relief, if the whole case made will not justify the granting of the particular relief applied for, the bill must be dismissed, although the complainant may have been entitled to some other aid: *Vide* 13 Vesey, 119; 2 Young & Jervis, 33; 1 John. Ch. R. 117; 2 Peters, 595; 1 John. 559; 2 Paige, 396.

The proper course to have been pursued by the court below was to dismiss the bill without costs; for it was shown that the defendants had committed trespass, if not waste, on the premises, during the complainants' term.

The decree below must be reversed, and the bill dismissed without costs, and without prejudice to the rights of the complainants to bring an action at law for the lead ore taken by the defendants, as they may be advised.

FAIRBANKS V. WOODHOUSE ET AL.

(6 California, 433. Supreme Court, 1856.)

Forfeiture under mining laws a question for the court. Mining laws, when introduced in evidence, are to be construed by the court; and the question whether by virtue of such laws a forfeiture has accrued, is a question of law. To submit such question to the determination of the jury is error.

Where there is no special plea to the jurisdiction, it is error to submit a jurisdictional point to the jury in such a way that if they found against the jurisdictional fact the result would be a judgment, apparently in bar, when the plaintiff would be entitled to another trial in a court having jurisdiction.

Appeal from the County Court of Mariposa County.

Action for restitution of a mining claim and for damages, appealed from a justice's court.

On the trial, the court below, on the request of defendants, gave, among others, the following instructions: "First that if the jury believe, from the evidence, that the claim in controversy, through plaintiff's neglect or abandonment, was forfeited by the mining law governing it at the time of defend-

ants' taking possession, they must find for the defendants." *
* * "Third, if the jury shall believe, from the testimony, that the mining claim in controversy was, at the commencement of this suit, and is at the present time, of more value than two hundred dollars, their verdict should be for the defendants; because justices of the peace have no jurisdiction to try the right to a mining claim when its value exceeds the value of two hundred dollars."

Neither the complaint nor answer avers any value of the mining claim, nor is any question of jurisdiction raised by the pleadings, though the record shows that the defendants moved in the justice's court to dismiss the action, on the ground that the value of the claim in dispute was \$1,000, which they were ready to verify. The jury rendered a verdict for defendants. Plaintiff moved for a new trial, which was denied, and judgment entered for defendants for \$218.70, costs in justice's court and county court. Plaintiff appealed.

WADE and FLOWER, for appellant.

RICHARD H. DALY, for respondents.

Mr. Justice HEYDENFELDT delivered the opinion of the court. Mr. Chief Justice MURRAY and Justice TERRY concurred.

The first charge to the jury given by the court was clearly erroneous. Mining laws, when introduced in evidence, are to be construed by the court; and the question whether by virtue of such laws a forfeiture had accrued, is a question of law. It was therefore improper to submit it to the determination of the jury.

The third instruction asked by the defendants was also improperly allowed. There was no issue, under the pleadings, which involved the question of the jurisdiction of the court, and that question ought, therefore, not to have been left to the jury. As the pleadings stand, the verdict would operate as a complete bar to any subsequent action by the plaintiff; whereas, if upon proper pleadings, the finding against him was the result of want of jurisdiction in the justice of the peace, he would still have his right of action in the district court.

For these reasons the judgment is reversed, and the cause remanded.

HALL V. FISHER ET AL.

(20 Barbour, 441. Supreme Court of New York, 1855.)

Misjoinder of parties and causes of action. Plaintiff filed complaint in his own right and as administrator, against the defendants personally and as executors, for an account of ore dug from an iron bed, of improvements made, and for all loss, damage and injury occasioned by the acts of the defendants and their testator; also for damages occasioned by an injunction wrongfully sued out etc. *Held*, that the plaintiff could not sue in his own right and in a representative capacity. 2. That there was a misjoinder of matters of contract with matters of tort and the matters of tort themselves involved both trespass and negligence, each of which should have been specially declared on, and that judgment was rightfully allowed for defendant on the demurrer.

Accounting—Fraud not considered. The fraudulent procuring of an injunction is not a matter which can be considered upon accounting between tenants in common.

Allegations in suit for malicious prosecution. An action for malicious prosecution will not lie until the final termination of the suit; and the complaint should allege want of probable cause, by averring that the suit was finally determined in favor of the defendant therein.

The injunction bond affords an ample remedy for any damage sustained if the writ has been fraudulently obtained, and these matters are not grounds for filing a bill for an account.

This was an appeal from an order made at a special term allowing a demurrer to the complaint. The plaintiff averred that on, and for a long time previous to the 12th of June, 1845, the plaintiff and his intestate were seized and possessed as tenants in common in fee simple, in their own right, of the one equal undivided fourth part of an iron ore bed on lot No. 42 of the iron ore tract in the county of Essex and State of New York, together with all the privileges appertaining thereto, and of all necessary timber and utensils on the lot, necessary to use in digging and carrying away the ore. That Henry Fisher, the defendant's intestate, was, at and during the same time, the owner and possessor of the remaining three fourths of the said lot and the ore rights and privileges, as tenant in common with the plaintiff and his intestate; that a very valuable mine or bed of iron ore was situated on said lot, which during the said time was worked by the said Halls and returned to them for their

share thereof, an annual value of \$10,000 and upward. That said Halls, previous to and on said 12th day of June, 1845, had expended \$10,000 in opening and uncovering the bed and in working it, and had also expended \$5,000 and upward in erecting and putting up shops, dwelling houses, barns, scales, coal houses and various other erections and fixtures for their necessary use in enjoying and availing themselves of the benefits, rights and privileges of the said lot. The complaint further averred that the said Henry Fisher, on the said 12th day of June, 1845, contriving and intending to injure and defraud the said Halls, and falsely pretending that they were not the owners of one-fourth part of said ore and said rights and privileges, but that said Fisher was the sole owner thereof, procured and caused to be served on the said Halls, an injunction out of the (then) court of chancery of the State of New York, enjoining and commanding the said Halls and their agents and servants to desist and refrain from digging or raising any iron ore on said lot 42, or from taking and carrying away, or selling, any ore raised or dug thereon since the first day of May, 1845, or from cutting any timber, or collecting any claims or debts, or discharging any on account of ore dug since that day. That at the time of the service of said injunction the said Halls had on hand on and near said lot 42, one thousand tons of iron ore, of the value of \$3,000, which they had raised from said bed between the 1st of May, 1845, and the issuing and service of said injunction, which they were entitled to use and sell, but which, by reason of said injunction, they were wholly prohibited from selling or using, and the same was taken possession of by said Fisher, and by him converted to his own use, or by his negligence wasted and destroyed, and said Halls never recovered, possession of the same. That there were divers debts due the said Halls for ore raised, which they were prevented by said injunction from collecting, whereby many of them became bad and uncollectible, and entirely lost; especially a debt against one Chester Stephens of \$300, for iron ore dug by him, who, while said injunction was pending, became insolvent, and the said debt became lost. That said Halls were also deprived of the privilege of digging ore and of the benefit of their expenditure and labor in uncovering and opening the said ore bed, and deprived of the use and benefit of their buildings, erections and fixtures, and the said

Henry Fisher took the sole and exclusive possession of the said ore bed with the appurtenances, and of all the rights and privileges of the said Halls, and of the buildings and erections, and of the ore on hand dug and raised since the said 1st day of May, 1845, and wholly excluded the said Halls therefrom, and so held them exclusively till the 13th of May, 1847, at which time the said Henry Fisher died, having first made and published his last will and testament, and appointed the defendants his executors; which will was, after his death, proved, and letters testamentary granted to the defendants as executors, by the surrogate of the county of Essex, on the 3d of June, 1847. The complaint further averred, that while said Henry Fisher held and retained the sole use and occupation as aforesaid, he received to his own use the whole of the profits and income of the said bed, etc., amounting to the sum of \$20,000, one fourth of which belonged to the said Halls, for which the defendants ought to account; and that said Henry injured and damaged the improvements and buildings, etc., erected by said Halls, by carelessness, negligence and improper usage, to the value of \$1,000, and while he used and held the same might have realized, by proper management thereof, a further sum of \$20,000, to one fourth of which said Halls would have been entitled; all of which was lost by the reason of the improper management of the said Henry and his agents, and whereby the said Halls, on regaining possession of said ore beds, were put to the expense of \$500 in replacing the same on its former footing, and lost other \$500 by the hindrance and delay occasioned by the necessary repairs; for all which the defendants ought to account. The complaint further averred, that since the death of the said Henry Fisher the said Ephraim Hall died intestate, and letters of administration on his estate were granted by the county judge of Essex county to the plaintiff. That after the death of Fisher and before the death of the said Ephraim Hall, the said injunction was dissolved, and possession of the said lot and beds and all their rights and privileges restored to the said Halls. The plaintiff claimed that by occasion of the premises the said Henry Fisher became liable to account to the Halls for their share of the use, rents and profits of the ore beds, and for their share of the moneys received by him, and for the other profits which he might have received by proper management, and for the

use of the buildings, erections and fixtures, and their wear and damage as aforesaid, and for the injuries occasioned thereto, and for the ore dug and raised by said Halls between said 1st day of May, 1845, and the service of the injunction, and for all losses, damages and injuries by the said Halls sustained; and that the defendants were liable as executors, etc., to account to the plaintiff, in his own right and as administrator of the said Ephraim, jointly, for such sums as might be proved due from said estate of said Henry upon such accounting, on occasion of the premises. And they prayed that an account might be decreed on these principles.

The defendant, Calvin Fisher, demurred to the complaint, for the following causes: 1. That there was a defect of parties plaintiff to the action. 2. That several causes of action had been improperly united in the same complaint. 3. That the plaintiff had improperly, in his complaint, alleged causes of action existing in his own right, with claim made by him in the capacity of administrator, etc. 4. That the plaintiff had also improperly united in his complaint alleged causes of action, arising upon contract express or implied, with claims of damages for injuries, with or without force, to property. 5. That the plaintiff had improperly united alleged causes of action in his complaint arising from negligence, with claims for an account for rents and profits of real property. 6. That the causes of action united in the complaint did not all belong to one class, and were not separately stated. 7. That the complaint did not state facts sufficient to constitute a cause of action.

The court, at special term, ordered judgment for the defendants on the demurrer, and the plaintiff appealed to the general term.

KELLOGG & HALE and G. A. SIMMONS, for the plaintiff.

B. & A. POND, for the defendants.

By the Court, C. L. ALLEN, J.

I am inclined to think there is an improper joinder of claims, by attempting to unite the rights of the plaintiff personally, with those in his representative character as administrator of Ephraim Hall. The two Halls, as charged

in the complaint, were tenants in common, owning one quarter, with the defendants' testator, who owned three fourths of the lot and the ore bed. The claim is that the defendants account to the plaintiff in person, and as such administrator, for their share of the rents and profits, avails and income of the ore bed, rights and privileges, while their testator held the exclusive possession thereof, and for their share of the ore dug and raised by said Henry from the land during that time, and for their share of the moneys had and received, including what said Henry ought to have received for the use, rents and profits of the improvements, buildings, fixtures and erections of the said Halls, and for the wear and damage of the same, and for the injury and obstructions to the use of said ore bed, and for the ore so dug and raised by the Halls between the 1st of May, 1845, and the issuing and service of the injunction, and for the debts which the Halls lost, and for all and singular the loss, damage and injury which the said Halls sustained by occasion of the premises, of every nature soever. The amount due to each tenant in common from his co-tenant, is a several debt to himself alone, 4 Paige, 363, and not to the tenants or a portion of them jointly. The rights and claims attempted to be united are inconsistent and adverse: *Alston v. Jones*, 3 Barb. Chy. R. 397. But the plaintiff alleges that this is an action for an accounting, and that all parties interested should be made parties to the suit, so that there need to be but one accounting. If this be so, then the causes of action or claims should be separately stated. How else can the defendant, if he has a defense of a different character against each co-tenant, avail himself of such defenses? He might in this case have one defense against the plaintiff as to his personal claim, and another defense as to the intestate whose rights he claims to represent as administrator. The statement of the causes should have been separate and distinct: Code, Sec. 167, Sub. 7; 4 How. 226; 5 Id. 171, 177; 8 Id. 177; *Brady v. Lockwood*, MS.

But however this may be, I am of opinion that several causes of action have been improperly united in the complaint. The plaintiff claims that the action is for an accounting, against a co-tenant in common, for receiving more than his proportion of the common property. But it is more. The complaint, after setting out the title of the plaintiff and

his intestate to one quarter of lot 42, and the ore bed thereon, and showing large and valuable erections and fixtures made by the Halls for their benefit and to enable them to enjoy and work the property, avers that on or about the 12th day of June, 1848, the said Henry Fisher, contriving and intending to injure and defraud the said Halls, and falsely pretending that the said Halls were not the owners of a quarter part of said ore and lot, but that he was sole owner thereof, procured an injunction in the manner stated in the complaint, and by means of its service occasioned all the damages which the plaintiff alleges were sustained. This is not matter of account, and no bill in equity or an action under 1 R. S. 750, Sec. 9, could be sustained upon it. The falsely and fraudulently obtaining this process, and the consequences arising out of its service, seem to form the principal part of the complaint. They are the gravamen of the action. The action of account should be founded upon a relation in the nature of trust: 3 Hill, 60. The bond required to be given, and which was given at the time of obtaining the injunction, afforded, as it was designed to do, an ample remedy for these damages, and to an action upon that the plaintiff should have resorted, If this were to be called partly an action for a malicious prosecution—and it would seem to be so, from the nature of the complaint—then it would not lie until the final termination of the suit. The complaint does not allege that the suit has terminated, but only that the injunction was dissolved. It should allege want of probable cause by averring that the suit was finally determined in favor of the defendant therein. A claim founded in tort is also united in the complaint, for diverting to his own use by the said Henry Fisher 1,000 tons of ore dug and raised by the Halls before the service of the injunction.

Another claim is for trespass on houses, erections and fixtures which the Halls erected at an expense of \$5,000, before the service of the injunction, and a claim for their share of this expense is also added. It is not averred on what land, or where, these erections were made; but the defendant's intestate is charged with wrongfully taking possession of, and using and injuring them by his carelessness and negligence, as well as the ore bed.

The plaintiff also claims that said Henry Fisher received \$20,000 profits, and might with proper management have received \$20,000 more. Now a tenant in common is not liable for negligence or misuse of the common property, nor for what he might have made by diligence, unless appointed bailiff, etc.: *Henderson v. Eason*, 9 Eng. Law and Eq. Rep. 337.

It is said by the plaintiff's counsel that there is but one cause of action, and that all the claims are but parts of one and the same establishment, and incidents of the tenancy in common and of the mining business. But all these are promiscuously stated and jumbled together, and they do not all belong to one of the classes mentioned in the several subdivisions of section 167. It may be questionable, since the decision in *Tripp v. Riley*, 15 Barb. 333, whether Henry Fisher could be chargeable and liable to account in this action, unless it was averred and shown that he had received more than his share (three fourths) of the ore bed. But it is not necessary to pass upon that point, here.

Without further examination I can only say that I fully concur with the learned justice who delivered the opinion at special term, and in the views there expressed. The order must be affirmed, with \$10 costs.

LIVE YANKEE CO. V. OREGON CO.

(7 California, 40. Supreme Court, 1857.)

Newly discovered cumulative evidence no ground for new trial. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative and going to contradict the witnesses of the other party.

Surprise as ground for new trial. Mere surprise at the evidence given by the witnesses of the defendant, is not sufficient ground for granting the plaintiff a new trial. He should submit to a nonsuit, and not take his chances for a verdict.

¹ **No presumption of uniformity in size of claims.** In the absence of mining regulations, the fact that a party has located a claim bounded by another, raises no implication that the last located claim corresponds in size, or in the direction of its lines, with the former.

Interest of witness. A witness in an action for a disputed mining claim,

¹ See *Sullivan v. Hence*, 9 M. R. 487.

who was in the employ of the party in possession at fixed wages, to be paid, however, from the proceeds of the claim, is not incompetent, when his wages are not dependent upon the sufficiency of such proceeds.

Appeal from the District Court of the Fourteenth Judicial District, County of Sierra.

This was an action for the recovery of possession of a mining claim. The only question in the case was, whether the dividing line between the plaintiffs' and defendants' claims ran on a course S. 57½ E., or S. 58 E., from an admitted starting point, the question being whether it ran parallel with the boundary line between the plaintiffs' claim and the Buckeye claim, the claim adjacent to that of plaintiffs on the other side. The evidence on this point was conflicting. The jury found a verdict for the defendants. The plaintiffs moved for a new trial on the ground of newly discovered evidence, of surprise, and of errors in law in the trial, and filed affidavits, setting forth newly discovered evidence, going to establish the line of division, as claimed by plaintiffs. The motion was overruled by the court below, and plaintiffs appealed.

On the trial the plaintiffs asked for the following instruction, among others. It was refused by the court below, which was assigned as error. It reads as follows: "That any claim of a definite number of feet front, and running back into the hill, without any local regulation to the contrary, and bounded by an older claim on one side, and by vacant ground on the other, will, by implication, run parallel with the line of the older claim.

Another error assigned is, that a witness for the defense named Jenkins, was allowed to testify, after stating, on his *voir dire*, that he was in the defendants' employ at five dollars per day, and that he had a verbal agreement with defendants to take his pay from the gold when it came out; but that it was not agreed that he should have no pay if no gold came out; he also stated that he was at work on the claim in dispute.

FIELD and SWEZY, for appellants.

DUNN and MEREDITH, for respondents.

MURRAY, C. J., delivered the opinion of the court, HEDENFELDT, J., concurring.

The court below properly refused the motion for a new trial.

The testimony set out in the plaintiffs' affidavits, is, at best, cumulative, and would serve to contradict the defendants' witness. The appellants can not complain of surprise. There was but one question in the case; that was, whether the line dividing the plaintiffs' and defendants' claim ran S. 57½ E., as contended by the plaintiffs, or S. 58 E., as contended by the defendants. To this issue witnesses were summoned and examined, and the case went to the jury upon it. If the plaintiffs were at all surprised by the testimony of the defendants' witnesses, they should have submitted to a nonsuit, and can not now, after taking the chance of a verdict in their favor, be allowed a new trial on such ground as they rely on.

The first instruction asked by the plaintiffs was properly refused.

In the absence of mining rules regulating the subject of claims, their courses, distances, etc., the fact that a party has located a claim bounded by another claim, raises no "implication," or inference, that the last located claim corresponds in size, or the direction of its lines, with the former.

The witness, Jenkins, was not incompetent; his wages did not depend upon the fact whether gold was taken out of the particular locality in dispute, although he was entitled to be paid out of it, if any was taken out; but his wages did not depend upon this fact, and therein this case differs from the one of *Shaw v. Davis*, 5 Cal. 466, in which the witness, who was a broker, and called for the purpose of substantiating the sale, testified on his *voir dire*, that if the sale failed, according to the custom of brokers, he was not entitled to commissions.

Judgment affirmed.

LEIGH CO. V. INDEPENDENT DITCH CO.

(8 California, 323. Supreme Court, 1857.)

¹ **Complaint for diversion of water.** A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action. It is not necessary that the complaint should further allege an appropriation of the water or an ownership thereof.

Appeal from the District Court of the Eleventh Judicial District, County of Placer.

The complaint alleges that the plaintiffs were the owners and in the possession of certain mining claims, situated in Volcano canyon, over which the waters of said canyon naturally flowed, and that they were entitled to have the waters of said canyon flow as they naturally did, but that defendants diverted them to the injury of plaintiffs. The defendants demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, in this, that the complaint did not state that plaintiffs were the owners of or had appropriated the water, or had been in possession of the same. The demurrer was overruled, and the defendants appealed.

No brief on file for appellants.

TUTTLE & HILLYER, for respondents.

BURNETT, J., delivered the opinion of the court, TERRY, C. J., concurring.

The demurrer was properly overruled. The allegation that the plaintiffs were the owners, and in the possession of the mining claims, was sufficient, without setting out any of the particulars of their title. And the ownership and possession of the claims drew to them the right to the use of the water flowing in the natural channel of the stream. The diversion of the water was therefore an injury to the plaintiffs, for which they could sue. The principle involved in this case

¹ *Stone v. Bumpus*, 4 M. R. 272.

was expressly decided by this court in the case of *Crandall v. Woods*, 8 Cal., 136. In that case it was said: "One who locates upon public lands with the view of appropriating them to his own use, becomes the absolute owner thereof, as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired."

Judgment affirmed.

FRALER ET AL. V. SEARS UNION WATER CO.

(12 California, 555. Supreme Court, 1857.)

¹ **Negligence—Joinder of causes of action.** In an action for injuries to mining claims occasioned by the negligent building of defendants' dam, the plaintiffs claimed damages for the washing away of their pay-dirt, and also for preventing them from working their claims by reason of the overflow: *Held*, that there was no improper joinder.

Duties of dam owner. The owner of a dam is bound to see to his own property, and to so govern and control it that injury may not result to his neighbors.

Carelessness of party injured. The want of reasonable care on the part of another who is injured by the breaking of a dam, can not be set up in defense to an action for damages for the injuries thus suffered.

Appeal from the Fourteenth District, County of Sierra.

This was an action for damages resulting from the careless and negligent construction of a dam by the defendants across a stream, and the consequent injury therefrom to the plaintiffs' mining claim.

The plaintiffs had judgment in the court below, and the defendants appealed.

The facts are sufficiently stated in the opinion of the court.

FRANCIS J. DUNN, for appellants.

McCONNELL & NILES, for respondents.

¹ *Penniman v. Winner*, 2 M. R. 449; *Prescott v. Wells*, 6 M. R. 89; *Woodbury v. Deloss*, 12 M. R. 144.

BALDWIN, J., delivered the opinion of the court, TERRY, C. J., concurring.

This was an action for injuries to mining claims, and loss of gold-bearing earth, occasioned by the negligent building of defendants' dam across and over a ravine, upon which the plaintiffs' claims were located—the claims being above the dam. The injury is charged to have resulted to the plaintiffs from the careless construction of a dam, and a reservoir, whereby the gold-bearing earth of the plaintiffs was washed away by the water and lost, and other injuries done to their mining claims and property.

The defendants demurred to the complaint, and assigned several technical causes of demurrer. The main ground taken here in argument is, that there is a misjoinder of causes of action in the complaint, in this: that the complaint claims damages for the immediate injury, by the breaking of the dam, to the pay-dirt, etc., of the plaintiffs, and also to the plaintiffs in preventing them from working their claim. But this is no misjoinder—if the objection be warranted by the facts—even according to the rules of common law pleading, which recognized the nice, and now obsolete, distinction between the action of *trespass vi et armis*, and the action of *trespass on the case*. For either of these classes of damages the form of remedy would be *case* by the old rule; the gist of the action not being the erection or breaking of the dam, but the negligence—the indirect consequence of which negligence was the injury—just as in cases of injuries caused by the not keeping of streets in repair, and the like: 1 Chitty on Pl. 126.

The complaint seems to be well drawn, and sufficiently states the facts, viz.: that the plaintiffs, before the committing the grievances complained of, owned and possessed the premises injured, and that the defendants carelessly, negligently and unskillfully built the dam and reservoir, and filled it with great quantities of water, which they detained at and along the dam, thereby causing the plaintiffs' claims to overflow, and the gold-dirt to be washed away, and the claims to remain unworked, etc.

Numerous instructions were given, and several were refused.

The court instructed the jury that the plaintiff could not recover unless the defendant was guilty of gross negligence. This was repeated in a variety of forms. We think that if any fault is to be found with the charges given it is that they were too favorable to the defendant.

An instruction (marked No. 4 of those asked by the defendant) was refused, and the refusal excepted to. The court was asked to charge, that if the jury believe that the injuries could have been prevented by the exercise of reasonable care on the part of the plaintiffs they must find for the defendant. This was refused. If such an instruction be proper in any case, it is not in this. The plaintiffs were in no default for keeping their property on their own premises, nor were they bound to remove it, nor to rebuild or alter the defendant's dam. He could not be held to the knowledge of the consequences, or the probable injuries resulting from the defendant's negligence. The defendant was bound to see to his own property, and to so govern and control it that injury would not result to his neighbor's. If, in consequence of gross neglect on the part of the plaintiff, the injury happened, a different rule might be applied; but a mere want of reasonable care to prevent the injury, does not impair the right to recover. We apprehend, if a man carelessly fires a gun into the street, that it would scarcely be admissible for him, when sued for the injury done another by it, to say that by reasonable care the other might have got out of the way. The instructions given in this general form, if the substance could be supported under any given state of facts, could only be to mislead the jury in this case; for what would be reasonable care under the circumstances? What should the plaintiffs have done? Should they have controlled the property of defendant? or removed his own effects? if so, when? or inspected the dam—or offered to repair it—or given formal notice of defects? These inquiries show the danger of such an instruction, as well as illustrate the radical error it embodies. See *Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 29.

Several other instructions were asked, but the substance of them had already been given; and the body of the charges—some twelve or more—presented to the jury, fully and clearly, the propositions of law which applied to the whole case, and

every material point, and enabled the jury fairly to pass upon the entire issue.

We can not interfere with their verdict, there being some evidence upon which it can rest.

Some other errors were assigned, but we think it unnecessary to notice them.

The judgment is affirmed.

ENNOR V. BARWELL ET AL.

(1 D.Cex. F. & J., 529. High Court of Chancery, 1860.)

¹ **No order interlocutory to break soil.** An order having been allowed on motion, before the hearing, giving plaintiff liberty to enter plaintiff's ground for the purpose of inspection, with leave to dig a trench to ascertain the geological formation, etc., it was *held*, on appeal, that an order allowing the breaking of the soil before the hearing was not according to the course of the court, and the order was discharged in that particular.

This was a motion by the defendants to vary an order of Vice-Chancellor Stuart allowing inspection by the plaintiff of lands belonging to the defendants.

The plaintiff was the occupier of mining property called the Priddy Minery. The defendants were the occupiers of adjoining property lying to the northward of it. The bill was filed to restrain the defendants from intercepting the flow of water to the plaintiff's mine. There was an ancient reservoir on the defendants' land, and the defendants had recently repaired the bank on the side adjoining the plaintiff's land to the height of one foot ten inches above the ground. The plaintiff alleged that the effect of this was to prevent a flow of water from the reservoir toward the plaintiff's land; and various other acts of the defendants were complained of as having the effect of preventing water from coming to the plaintiff's property. The defendants denied that the repair of the embankment had at all affected the flow of water from the reservoir, and further set up the case that the geological conformation of the ground was such that there never could

¹ See *Cole Co. v. Virginia Co.*, 7 M. R. 516.

have been a natural flow of water from the property of the defendants to that of the plaintiff. On the 29th of February, 1860, the plaintiff moved for an order that he might be at liberty to inspect the defendants' land and dig a trench to ascertain its geological formation; and the notice of motion also asked for leave to do other acts on the defendants' land for the purpose of ascertaining the direction of the natural flow of the water.

The following cases were cited: *East India Co. v. Kynaston*, 3 Bligh. 153; *Lonsdale v. Curwen*, 3 Bligh. 168; *Walker v. Fletcher*, 3 Bligh. 172; *Att'y-Gen. v. Chambers*, 12 Beav. 159; *Bennitt v. Whitehouse*, 28 Beav. 119.

The Vice Chancellor made the following order:

"Order, that the witnesses and agents of the plaintiff, N. Ennor, be at liberty at all seasonable times, and on giving twenty-four hours notice, to inspect such part of the soil and ground within the Chewton minery, in the occupation of the defendants, E. H. Barwell and T. S. Wright, in the pleadings of this cause mentioned, lying to the northward of the Priddy minery, belonging to the plaintiff, N. Ennor, as is between the partition wall of the said Priddy minery on the south, and the pond head or embankment of the basin or reservoir, in the pleadings of this cause also mentioned, on the north; and that the plaintiff's workmen, servants and witnesses be at liberty to make a trench or trenches in the said ground or soil for a distance not exceeding ten yards in length, northward from the said partition wall, and not exceeding twenty feet in depth, in order to ascertain the nature of the geological formation of ground there; and also that the said plaintiff's witnesses and agents be at liberty at seasonable times, on giving twenty-four hours notice, to inspect and view the old swallet or mine-hole near Stock's house, in the pleadings of this cause also mentioned, and to make sections, models, or plans thereof. And in order to enable such inspection to be made, order, that the plaintiff be at liberty to remove the earth and obstructions lying therein, and at the ends, roads and passages leading thereto; and also that the plaintiff, his servants and workmen, be at liberty, for a width of two yards, to cut down the pond head or embankment of the said basin or reservoir on that side thereof which is next the Priddy minery belonging to the plaintiff, to the level of the ground there, and to clear out and

remove the weeds and obstructions lying in the course or drain which is in or near the center of the said basin, for the purpose of ascertaining and evidencing in which way the water in such basin would flow if left to do so in its natural state or channel. And it is ordered that the plaintiff do give to the defendants twenty-four hours notice before any inspection *or operation* under this order, and specify in such notice the names of the persons who are to make such inspection *and to perform such operations.* The plaintiff, by his counsel, undertaking to abide by any order of the court as to making good such damage to the defendants, if any, as may be occasioned by the *operations necessary for carrying into effect this order.*"

The defendants moved to vary this order.

Mr. BACON and Mr. F. WEBB, for the appeal motion.—We do not object to so much of the order as gives a right to inspect. There is no doubt that the court, in a case like the present, will give the plaintiff facilities for inspection; but we contend that it will not, at all events on a mere interlocutory application, give the plaintiff liberty to break up the freehold for the purposes of inspection.

Mr. MALINS and Mr. HANSON appeared in support of the order.

The Lord Justice TURNER asked whether there was any reported case in which the court had before the hearing allowed a plaintiff to enter upon the defendants' property and break up the soil for the purposes of inspection. No case to that effect was produced.

The Lord Justice KNIGHT BRUCE:—In my judgment those parts of the order which allow the plaintiff to break up the soil of the defendants' land and to remove the weeds ought to be struck out. The rest of the order, it appears, is not objected to.

The Lord Justice TURNER:—I am of the same opinion. I think it is not according to the course of the court to make, upon interlocutory application before the hearing, an order authorizing the plaintiff to break up the soil of the defendants' property for the purpose of inspection.

The order was accordingly varied by striking out those parts which are printed in italics.

GRADY ET AL. V. EARLY ET AL.

(18 California, 108. Supreme Court, 1861.)

¹ **Description of bar claims.** Description of bar placer claims, giving name of claim and adjoining claim, size and location in canyon: *Held*, sufficient.

Discretion in excusing juror. During the examination of a juror the fact was elicited that there had been a forcible entry and detainer suit for the same ground in controversy, and thereupon another juror named Taylor, who had been previously called and accepted, volunteered the statement that the title had been spoken of in the forcible entry case, and that his opinion was concluded on the title. The plaintiffs then challenged Taylor for cause, defendants resisting on the ground that it was too late, but the court excused him: *Held*, no abuse of discretion.

Interest of witness in ejectment. In ejectment for mining claims and for damages for gold extracted therefrom, a witness for plaintiffs stated on his *voir dire* that he was an owner in the claims during the time the alleged damages occurred, but had sold to some of the plaintiffs; defendants objected to witness, on the ground of interest and incompetency. Before the question was passed upon, the plaintiffs obtained leave to strike their claim for damages: *Held*, that the objection to the witness was properly overruled.

Ejectment—Recovery on possession. Plaintiffs in ejectment for a mining claim may rest their recovery upon prior possession, and the action does not necessarily put in issue the legal title. Their recovery will not be conclusive of the title of their grantor.

Appeal from the Eleventh District.

Ejectment for mining claims, set out in the complaint as "a certain tract or parcel of mining ground located on the middle fork of the American river, at the mouth of Mad Canyon, township number six, Placer county, State aforesaid, described as follows, to wit: Lying on New York Bar, at the mouth of said Mad Canyon aforesaid, fronting said American river, and bounded on the south by said river at low water mark, said claim being in front one hundred and twenty feet, more or less; and on the easterly by a tract of mining claims known as the Carr claims, and on the westerly by a tract of mining claims known as the New York Bar claims and the Rich claims; and northerly by claims known as the Bank claims. Said claims of plaintiffs above described being one hundred and

¹ *Tibbells v. Moore*, 9 M. R. 348.

twenty feet in width, more or less, and extending back across New York Bar in length three hundred feet, more or less, and further known as the Dutch claims."

The complaint alleged ownership and possession in plaintiffs and their grantors since 1852, until the ouster by defendants, which is laid in October, 1859; and that defendants have wrongfully extracted large amounts of gold from the premises entered upon, and appropriated it to their own use, to the great damage, etc.

There is also a special averment that "defendants, since the time last mentioned, have taken large quantities of gold dust from plaintiffs' mining ground last described, to wit: gold dust of the value of three thousand dollars, as plaintiffs are informed and believe."

Defendants demurred, on the ground that the complaint does not state facts sufficient to constitute a cause of action; that it is ambiguous, unintelligible, and uncertain.

The substance of the answer is, that defendants are the owners of the New York claims, on the same bar with plaintiffs' claims, known as the "Dutch claims," but that these latter do not and never did embrace the New York claims, excepting perhaps about twenty feet on the upper end thereof; that defendants have never been in possession of any of plaintiffs' claims, and that they and their grantors have occupied their own claims for the last four years.

At the trial, one Taylor was called as a juror, and accepted. Subsequently, during the examination of another juror, the fact that there had been a former forcible entry and detainer suit for the same ground was elicited from him, whereupon Taylor stated that "his mind was made up; that the title had been spoken of in the forcible entry case, and that his opinion was concluded on the title." This statement of Taylor was of his own motion, and not in response to any question or suggestion from either party. Plaintiffs then challenged Taylor for cause, defendants resisting, on the ground that it was too late. Juror excused by the court, defendants excepting.

Among the witnesses for plaintiffs was Paul Wagoner, who stated on his *voir dire* that he was an owner in the Dutch claims from the fall of 1858 to February, 1860, during the time the alleged damages accrued, and that at the latter date

he sold to some of the plaintiffs. Defendants objected to witness on the ground of interest and incompetency. Before the question was passed upon, plaintiffs obtained leave to strike from their complaint their claim for damages, which they did by striking out the special averment on that subject hereinbefore given. After this, plaintiffs did not claim damages, offered no testimony to that end, and the jury were charged to give none. Defendants still insisted on their objection to the witness, on the ground of interest. Overruled, defendants excepting. Verdict and judgment for plaintiffs.

Defendants appeal.

TUTTLE & HILLYER, for appellants.

HEREFORD & LONG, for respondents.

BALDWIN, J., delivered the opinion of the court, COPE, J., concurring.

1. The first objection is to the complaint, because the premises, a mining claim, are not described with sufficient definiteness. The point is not well taken.

2. There is no good objection to the excusing of the juror. The statement by the juror was sufficient to justify the court in discharging him. The object is to get a fair and impartial trial; and in civil cases we should interfere with great reluctance with the discretion of the court in excusing a juror when it thought the purposes of justice were to be subserved by excusing him. Except under very peculiar circumstances, it is difficult to see how the erroneous exercise of a mere discretion in excusing a juror in a civil case, could operate to the prejudice of a party. We see no error in the ruling in this case.

It is not apparent that the witnesses were incompetent. The recovery by the grantee of the witnesses would not necessarily give a right of action to the grantors for damages accruing before the conveyance and recovery. We are not cited to any authority which holds that a recovery in ejectment, even upon the title, affirms the existence of a title in the grantor, and that the record is conclusive, or any proof of the grantor's title. For all that appears, the plaintiff may

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have rested his recovery upon the mere fact of prior possession, and the legal title may not have been involved in the issue at all. We apprehend that, at the most, the judgment is only conclusive of the title of the plaintiffs, not of his predecessors. There is nothing in the point as to the amendment of the complaint.

Judgment affirmed.

TAYLOR V. NEW ENGLAND COAL MINING Co.

(4 Allen, 577. Supreme Court of Massachusetts, 1862.)

Failure to deny personal liability. In an action against a corporation, in which certain persons are summoned as stockholders, the omission by them to file an answer specifically denying the allegation that the corporation had omitted to comply with the requirements of the statute, whereby the stockholders were made liable for the corporate debts, does not operate as an admission of that fact.

The burden is upon the plaintiff to show that the persons whom he has summoned as stockholders are liable for the payment of the debts of the company.

Personal liability of outgoing stockholder. One who had ceased to be a member of a corporation at the time a judgment against it was rendered, can not afterward be held liable as a stockholder of the corporation in a suit upon the judgment.

Contract upon a judgment recovered by the plaintiff against the defendants in September, 1858. Francis H. Dewey and Edmund Freeman were summoned as stockholders in the defendant corporation, the writ containing, at the end of the declaration, a recital and direction as follows: "And whereas said corporation has failed to comply with the laws of this commonwealth concerning corporations, whereby the stockholders of said company have become individually liable for the debts of the corporation, you are hereby commanded to attach the goods or estate of Francis H. Dewey, of Worcester, in said county of Worcester, and Edmund Freeman of Springfield, in our county of Hampden, who now are, or at the time of contracting the debt in the plaintiff's declaration mentioned, were, stockholders in said corporation," etc., and each of them

filed an answer, denying that he was a stockholder, or that he was in any way liable to the plaintiff for his claim against the corporation.

At the trial in the superior court, before Rockwell, J., it was in dispute whether Dewey was ever a stockholder in the corporation; but it appeared and was specially found by the jury that he was not a stockholder at or after the time when the judgment was recovered. There was evidence tending to show that Freeman had been a stockholder for several years past. There was no evidence that the corporation had failed to comply with the provisions of Rev. Sts. C. 38, § 22; and the judge instructed the jury that, in order to warrant a verdict against either of the alleged stockholders, they must be satisfied that there had been some act or omission by the corporation which would render its stockholders liable under the statutes of this commonwealth, and the burden of proof was on the plaintiff to show this.

The jury returned several verdicts for Dewey and Freeman, and the plaintiff alleged exceptions.

E. WILLIAMS, for the plaintiff.

H. WILLIAMS, (F. H. DEWEY with him,) for Dewey and Freeman.

BIGELOW, C. J.

It is clear that Mr. Dewey is not liable as a stockholder for the debt claimed in this action. He had ceased to be a member of the corporation at the time the judgment declared on was rendered. The original debt was thereby merged, and a new debt created, for which those who were not then stockholders were not liable: *Handrahan v. Cheshire Iron Works*, 4 Allen, 396.

It is equally clear that the plaintiff failed to show that either of the persons summoned as stockholders was chargeable with any debt of the corporation. The statute, by authorizing the stockholders who are summoned in the action to appear and defend it, necessarily imposes on the plaintiff the burden of proving that the persons summoned are stockholders in the corporation, and that as such they are liable for its debts. Although they can not be allowed to dispute the cause of action

they can defend against the claim of the plaintiff to recover an execution, on which their private property may be taken. But in making such defense they are not bound to prove a negative. It is not incumbent on them to show, in the first instance, either that they are not stockholders, or that the corporation has not omitted to comply with the requisitions of the statute regulating manufacturing corporations, so that the stockholders are not rendered liable for the corporate debts. The affirmation of this issue lies on the plaintiff. He is bound to show that the persons whom he has summoned as stockholders are liable for the payment of the debts of the company. No such proof was offered at the trial of the present case. The plaintiff only proved that Dewey and Freeman were stockholders in the corporation. He failed to offer any evidence that the corporation had in any particular omitted to comply with the requirements of the statute, whereby their stockholders were made liable for the corporate debts.

The error of the plaintiff consists in supposing that the provisions of the Practice Act, Gen. Sts. C. 129, §§ 17, 27, are applicable to a proceeding like the one at bar, and that the omission to file an answer denying, in clear and precise terms, that the stockholders in the corporation were liable for the debts, operated as an admission of that fact. But the provisions above cited are intended only to apply to the actions enumerated in the first section of that chapter, and comprehended within one of the three divisions of actions therein named; namely, actions of contract, actions of tort and actions of replevin. They do not apply to a case like the present, which is of a peculiar and anomalous character, so far as it is designed to try the question of the liability of stockholders for corporate debts. As to them, it is, properly speaking, neither an action of contract nor an action of tort. It is a proceeding *sui generis*, by which a legal liability created by statute is sought to be enforced, which does not come within any of the usual forms of actions known to the common law.

Doubtless it was competent for the court before which the suit was pending to order the persons who were summoned as stockholders, and who had appeared to defend, to file a specific statement of the grounds on which they intended to deny

their liability. But in the absence of such order, they were not bound to file a definite and precise answer, and their omission to do so could not be construed into any admission of liability.

Exceptions overruled.

ANSPACH V. BAST.

(52 Pennsylvania State, 356. Supreme Court, 1866.)

¹ **Defense to note payable out of mine.** Bast sued Anspach on a note at six months; in his affidavit of defense, Anspach averred that he had bought a colliery from Bast, to pay thirty cents a ton for coal mined until all the purchase money was paid, Anspach to work the mine "diligently and constantly;" that he gave the note in settlement of the purchase money, with an agreement that it was to be renewed, if enough coal had not been got out under the agreement to pay it at maturity. etc. *Held*, that the affidavit, if otherwise sufficient, was insufficient for not averring that the mines had been "diligently and constantly worked."

Cotemporaneous parol promise to renew note. Parol evidence of an agreement when the note was made, that it should be renewed at maturity, would contradict the written contract of the parties, and was therefore inadmissible.

Error to the District Court of Philadelphia.

This was an action of assumpsit, commenced June 30, 1865, by Emanuel Bast against John Anspach, Jr., on a promissory note dated December 22, 1864, from Anspach to Bast, payable in six months, for \$5,150. Anspach in his affidavits of defense, averred that the note in suit, with others, was given in settlement of the purchase money of a lease of coal mines, etc., upon an agreement dated December 12, 1864; that he was to pay monthly, thirty cents per ton for every ton of coal mined, until the purchase money, which was to be fixed by referees, should be paid—the colliery to be diligently and constantly worked by Anspach—and if the whole purchase money and interest be not thus paid in three years, the balance to be paid in cash; that after the price was determined, Bast importuned him to give him notes for the payment, which he at first re-

¹ *Worden v. Dodge*, 2 M. R. 116.

fused, lest he might not get enough coal out to meet their payment, but that for the convenience of Bast he gave this note, "with the express and positive agreement, that if he was unable to pay when the note matured, the term was to be extended by the renewal of the note for six months more;" that when the note was given it was the intention of the parties that the money should not be exacted to a greater extent than would become due under the agreement; that he had not taken from the mines coal sufficient to pay the note before maturity; "that on or about the 1st of May last, there was a great stagnation in the coal business, and a general stoppage of coal operations in the region where the mines are located, and no coal has been shipped from these mines since then."

Judgment was entered January 6, 1866, for want of a sufficient affidavit of defense, which was the error assigned.

A. V. PARSONS, for plaintiff in error.

J. W. PAUL, for defendant in error.

The opinion of the court was delivered by STRONG, J.

The affidavits of defense set forth nothing that could avail the defendant at a trial, even were it admissible to show by parol evidence that the parties had agreed to a conditional change of the promise contained in the note. They affirm that it was agreed, if the defendant should be unable to pay the amount of the note at its maturity, that he should have the time extended six months, and that this agreement for an extension was based upon the original contract for the purchase and sale of a colliery; that the payment of the purchase money was to be made from the coal mined as therein stated, and that it was not intended to alter or accelerate the time of payment. By that contract (incorporated into the affidavit) the defendant was bound to pay for each ton of coal mined from the premises sold to him, the sum of thirty cents monthly until the purchase money was fully paid. He also covenanted in it that the colliery should be diligently and constantly worked by him. It was not enough, therefore, that he did not obtain coal. Assuming that he might have entitled himself to a renewal of

his note, it was essential to such a right that he should diligently and constantly work the colliery, and that notwithstanding such work, he should fail to take out a sufficient quantity of coal to pay the sum stipulated at the rate of thirty cents per ton.

He was not at liberty to suffer the mines to be idle, much less to cease mining and yet claim an extension of time for payment, because he had not taken out the coal which would have been mined had he performed his covenant. But the affidavits make no averment that the colliery was diligently and constantly worked.

They affirm only that the defendant had not taken from the mines coal sufficient to pay the note before it matured, and that some time before its maturity there was a great stagnation in the coal business, and a general stoppage of coal operations in the region where the mines are located, and that no coal had been shipped from the mines after that time. It is manifest that an inability to pay the note out of coal mined, arising from the defendant's neglect to mine, was not a defense, according to his own showing. The promisee was not to run the risk of business stagnation. The defendant had unconditionally agreed to work the colliery with diligence and constancy. From this agreement he was not released by the fact that he could not mine profitably, or that he could not sell coal, or that he did not send it away from the mines. According to his own averments it was not inability to make profit or to carry on business successfully, but inability to take out sufficient coal with diligent and constant work, that entitled him to delay or an extension of the time of payments; yet such an inability he has not averred. The affidavits, therefore, fail to exhibit any defense to the plaintiff's claim.

It is also decisive against the defendant that he relies on a parol agreement made contemporaneously with the note, that it should not mature absolutely in six months according to its terms. Were he permitted to go to trial, it would not be competent for him to give parol evidence of such an agreement. It contradicts the written contract of the parties. No doubt, in a suit between the original parties to a promissory note, parol evidence may be given to show what the consideration of the note was, or that the consideration had failed.

Such evidence does not contradict or vary the instrument.

But no case goes to the length of ruling that such evidence is admissible to change the promise itself, without proof or even allegation of fraud or mistake; the contrary has been repeatedly decided. In *Ware v. Graham*, 3 Camp. 56, it was ruled that in an action on a promissory note or bill of exchange, the defendant can not give in evidence a parol agreement entered into when it was drawn, that it should be renewed, and payment should not be demanded when it became due. The doctrine of this case was repeated in *Moseley v. Hanford*, 10 B. & C. 729, in *Woodbridge v. Spooner*, 3 B. & A. 233, and in *Free v. Hawkins*, 8 Taunton, 92. Such also is the ruling of our own courts. *Hill v. Gaw*, 4 Barr. 493, was a suit by the payee of a check against the drawer, in which it was held that evidence of a parol agreement made at the time of the execution of the check, that payment was not to be demanded at maturity, but that time was to be given at the election of the drawer, could not be received. The court said they could not perceive any difference in this respect between a check, a promissory note and a bill of exchange. And this rule of exclusion is not peculiar to mercantile contracts: *Fleming v. Gilbert*, 3 Johns. 528; *Keating v. Price*, 1 Johns. Cases, 22; see also *Fulton v. Hood*, 10 Casey, 365. It was also ruled in *Mason v. Graff*, 11 Casey, 448, that the acceptor of a bill of exchange is not to be permitted to vary the terms of his acceptance by parol evidence. The authorities against the position of the defendant are too numerous and direct to be disregarded, and the reasons upon which they are founded are controlling.

Judgment affirmed.

AHRENS V. ADLER.

(33 California, 608. Supreme Court, 1867.)

Form of complaint in action based on sale of mine, induced by fraud. **Amendment after case submitted—New testimony.** An amendment by striking out a portion of the complaint, after the case has been submitted to the court, will not entitle the defendant to introduce more testimony if the amendment has in no respect changed the issues.

¹ **Action for false averment of value—Ex delicto.** A complaint averring that the defendant, by false representations of the value of a lode, induced plaintiff to purchase and pay a sum of money therefor, and the receipt of the deed from defendant, and claiming general damages exceeding the consideration paid, is an action *ex delicto* and not *ex contractu*.

Offer to return deed—Issues unchanged by amendment. An averment in such complaint of an offer to return the deed, is not an averment of a rescission of the contract, nor an offer to rescind; nor does an amendment striking out the offer to return the deed change the issues tendered in the complaint.

Extent of recovery for fraudulent sale. In action for damages for the fraudulent sale of a mine, the plaintiff's recovery is not restricted to the amount of the consideration paid by him.

Effect of offer to return deed. An offer to return a deed does not reinvest the grantor with the title, nor is it a rescission of the contract by the grantee, nor an offer to rescind.

Appeal from the District Court, Twelfth Judicial District, City and County of San Francisco.

The following was the complaint in this action:

"August Ahrens, the plaintiff in this suit, complains of Bar Adler, the defendant, and for cause of action alleges: That on the 31st day of July, A. D. 1863, and also on divers days and times previous thereto, as well as after that date, and up to the 10th day of October, 1863, at the city of San Francisco, the defendant, Bar Adler, having offered to this plaintiff that he would convey, by a certain instrument commonly called a mining deed or conveyance, the undivided one half part of the interest which he, the defendant, then possessed in the following enumerated veins or lodes of rock, containing, as defendant alleged, precious metals of gold, silver, and copper, situate in the then Territory, now State, of Nevada, described as fol-

¹ *Simons v. Vulcan Co.*, 6 M. R. 633; *Byard v. Holmes*, Id. 657.

lows, to wit: (*Here follows description of Mountain Queen, Minnehaha and several other lodes*) upon condition that this plaintiff should render services and perform labor by himself and servants between that date and the 16th day of November, 1863, as house builder and mechanic, on certain buildings, the property of the defendant, which he was then about to commence the construction of, situate on the north side of Sacramento street, between Dupont and Stockton streets, in the city of San Francisco, and also furnish materials to be used in the construction of said buildings, such as brick, lumber, lime, and such other materials as are generally used in the construction of brick buildings, to the defendant, to the extent, price and sum of one thousand four hundred dollars, at the then gold market price for such labor and materials, did willfully, knowingly, falsely and fraudulently, and with intent to cheat and defraud the plaintiff, falsely and fraudulently represent, say and declare to this plaintiff that the interest which the defendant then offered to convey to plaintiff in said several mines, lodes or ledges was of great value; that the said interest was of the market value of three thousand dollars; that the said mines were well known; that the defendant then took from his pocket and delivered to plaintiff for the purpose and with intent fraudulently to induce plaintiff to purchase said interest, a piece or sample of very rich gold-bearing quartz, rock, or ore (which is here produced); and the defendant then stated to plaintiff, that of his own knowledge the specimen or sample of rock in question had been taken from the said Minnehaha Mine or Ledge; that he had taken it therefrom; and that said specimen in point of richness and value was scarcely a fair average specimen or sample of the ore of said mine; that the said mine was a large one; that the lode or ledge was from fourteen to twenty feet in thickness at the croppings or surface; that it grew wider all the way below the surface to the depth of one hundred and thirty feet, to which depth the mine had been opened; that said mine contained tens of thousands of tons of rock or ore as rich, if not much richer, in gold than the sample or specimen shown as aforesaid; that said ledge or lode then commanded in the market here one hundred dollars per foot; that the defendant had examined said several mines; that he found

that they were one and all rich in gold, silver and copper; that he found the said Mountain Queen Ledge, Lode or Mine was richer even than the Minnehaha Ledge or Mine; that he would guarantee to the plaintiff that the Minnehaha Ledge would be worth and command in this market one thousand dollars per foot within the sixty days thence next ensuing; that he would warrant that the interest which he proposed to convey to plaintiff in said several mines or lodes as aforesaid, before the close of the year 1863, would command in this market forty thousand dollars to sixty thousand dollars; that if plaintiff would take said interest and pay the consideration aforesaid, and if afterward plaintiff should think he made a bad bargain, that he (the defendant) would bring forthwith a good, wealthy man to plaintiff who would take said interest off plaintiff's hands, and pay him fourteen hundred dollars therefor, and a large profit besides; that the defendant was a wealthy Jew; that he knew plaintiff was not a Jew, but that plaintiff's wife was a Jewess, and because plaintiff's wife was a Jewess the defendant was plaintiff's friend, and that the defendant honestly desired to help plaintiff; that if plaintiff would take the defendant's *sacred* word of honor in said matter and purchase said mining interests, this plaintiff would at once become wealthy; that plaintiff should keep quiet about said affair; that the offer which he then made to plaintiff in point of liberality was such an one that he would make to no one but plaintiff; that he would not like that said offer would be noised about, for fear that his (the defendant's) wife might hear of it; that if she should hear of it she would lock him out of doors; that she was in the habit of serving him in that manner very often; that she generally served him rightly.

"That plaintiff, relying upon said representations, on the 31st day of July, 1863, accepted the defendant's said offer, and entered into a building contract or agreement with the defendant, whereby plaintiff agreed to render and perform, by himself and servants, labor as house builder and contractor, and to furnish building materials as aforesaid, and to work up the same into and about the two brick buildings, the property of the defendant aforesaid, to the value, at the market price for such labor and materials, of one thousand four hundred dollars (\$1,400).

"That the plaintiff fully, in all respects, furnished the materials for, and performed the labor on, said buildings, to the value, at the gold market price, of one thousand and four hundred dollars; and the plaintiff duly performed all the conditions of said agreement on his part to be kept and performed, and on the 10th day of October, 1863, plaintiff became entitled to a deed of said mining interest from the defendant, and afterward, on the said 10th day of October, 1863, the defendant, in consideration of the sum of one thousand four hundred dollars which had been previously paid to him in building materials and labor as aforesaid, made and delivered to plaintiff a deed or conveyance of the mining interest aforesaid. That in truth, and as the defendant then and all the time well knew, the said mining interest was not of great value, nor of any value whatsoever; that the same was worthless and unsalable; that said sample or specimen of quartz had not been taken by defendant from the Minnehaha Ledge; that defendant had not visited or examined said mines; that the said mines were unknown; that said specimen or sample was not an average sample of the ore of said Minnehaha Mine, or of any said mines or lodes; that in truth the said specimen proves to be a piece of California gold-bearing quartz; that the said Minnehaha Mine is not a large one; that there was no such mine; in fact, that said mine is not fourteen to twenty feet in thickness at the surface, nor does the same grow wider below the surface of the earth; that said mine had not been opened; that said mine does not contain tens of thousands of tons of rock or ore as rich as the specimen shown by defendant, or any rock of that quality or richness, or of any richness whatever; that said ledge or mine did not then or at any time sell for one hundred dollars per foot; that the defendant had not examined any of said mines or lodes; that none of said mines were or are rich in gold, silver, or copper; that the Mountain Queen Ledge was not rich; that there was no such mine; that the Minnehaha Ledge did not at any time command one thousand dollars a foot in this or any other market, or any other price per foot; that the said mining interest did not at any time during the year 1863 command forty thousand dollars, or sixty thousand dollars, or any other price; that in due time

plaintiff did think he had made a bad bargain, and requested defendant to produce a man who would take said interest off plaintiff's hands for one thousand four hundred dollars; that defendant did not produce such man or any man; that defendant did not desire to help plaintiff; that plaintiff did take and act upon defendant's sacred word of honor in said matter.

"And the foregoing is the sequel; that plaintiff did not become wealthy by the purchase of said mining interest; that the said mining deed has not been recorded; that within thirty days after the delivery thereof by defendant to plaintiff, this plaintiff discovered for the first time that he had been misled and defrauded by the defendant in the premises; as, that is to say, that said mining interest was absolutely worthless, and never had been of any value whatsoever.

"That by reason of the premises herein above stated, this plaintiff has been misled, cheated, wronged, and defrauded by the defendant, to plaintiff's damages in the sum of two thousand five hundred dollars. Wherefore, plaintiff demands judgment against the defendant in the sum of two thousand five hundred dollars, with costs."

The complaint was not verified. The answer was a general denial. The case was tried by the court on the 22d day of August, 1866, and each party introduced testimony on the issues, and the cause was submitted. On the 8th day of November, 1866, and before the court had given its decision, the plaintiff asked leave of the court to amend his complaint by striking out the following: "And thereupon, to-wit: on the 30th day of October, 1863, at the city of San Francisco, this plaintiff called upon the defendant and offered to return said mining interest to defendant; that the defendant then refused and still refuses to accept the return to him of said mining deed and interest. Plaintiff here tendered said mining deed to the defendant." The defendant made no objection to the amendment, and the court allowed the same. Thereupon the counsel for the defendant offered by further and additional testimony to prove that at the time of the sale the defendant told the plaintiff he knew nothing of the value of the mines, and had never seen them, and could and would make no representations of their

value. To this plaintiff objected: 1st, that the amendment made by plaintiff did not open the whole cause for additional evidence; 2d, that the defendant had already introduced evidence to the same point, and that offered would only be cumulative; and 3d, that the plaintiff had offered no additional evidence in the cause. Plaintiff's objections were sustained, and defendant, by his counsel, excepted. Defendant then offered to prove the value of the said mining interests at the date of the commencement of this action, which was objected to by plaintiff: 1st, that no proof of the value of said mining interest was competent, except that showing such value at the date of the contract, the 31st of July, 1865; and, 2d, that the amendment allowed did not warrant the opening of the cause for further proofs of any kind, and especially that offered by defendant. Said objections were sustained by the court, the offered evidence ruled out, and defendant excepted. Defendant thereupon offered to prove that on the 10th day of October, 1863, when the deed from defendant to plaintiff was executed, the value of said mining interests was equal to two thousand dollars. To this offered proof plaintiff objected: 1st, that the amendment asked and allowed did not open the case for further proofs, and especially that offered by defendant; 2d, that no proof of value would be competent, except such as would show its value at the date of July 31, 1863, the time it was agreed to be taken by plaintiff from defendant; and, 3d, that defendant had already introduced evidence to the same point. On this offer and the objections thereto, the court ruled that defendant might prove the actual value of said mining interests on the 10th day of October, 1863, provided defendant would follow the same up by proofs that plaintiff at said date knew of such actual value of said mining interests, and took said deed from defendant with such knowledge. Defendant declined to make or offer any such proofs as were suggested by the proviso contained in the court's ruling, and thereupon plaintiff's objections to said offered proof were sustained, and the defendant's counsel excepted. Whereupon judgment was entered in favor of plaintiff for the sum of fourteen hundred dollars, on said 8th day of November, 1866.

The defendant appealed from the judgment and from an order denying a new trial.

JARBOE & HARRISON, for appellant.

THOMPSON CAMPBELL, for respondent.

By the court, SHAFER, J.

The correctness of the ruling by which the evidence offered by the defendant, after the complaint had been amended, was rejected by the court, depends upon whether the issues raised by the denials of the complaint were changed by the amendment in any material particular, and that is the point to which the argument of the appellant is addressed.

Our judgment upon the question is, that the issues were not altered by the amendment, and that there was not even a complexional change made in them.

The defendant claims that the complaint, prior to the amendment, made a case of money had and received by the defendant to the plaintiff's use; the purpose being to recover back the consideration paid, on the ground that the contract had been rescinded by the plaintiff. But money had and received was not the case which the complaint presented. The action, in common law parlance, was not *ex contractu*, but *ex delicto*. Its gist was a fraud practiced upon the plaintiff by the defendant through false representations—whereby the plaintiff was drawn into the contract for the purchase of the mines. General damages were claimed; and they, it is to be observed, were not limited to the purchase money; but far exceeded it in amount. The clause of the complaint struck out under the leave to amend did not aver in direct terms that the sale had been rescinded, nor did the facts detailed in the clause amount to a rescission, or to an offer to rescind in legal effect. An offer "to return the deed" given by the defendant to the plaintiff would not, if it had been accepted, have invested the defendant with the title to the mines. There being, then, no effectual averment of an offer by the plaintiff to put the defendant in *statu quo*, rescission was not a point in the right counted on. The averment of an "offer to return the deed" was abortive from the beginning.

We may, and if need be, we are bound to presume, that the case was tried as one sounding in damages; fraud being the gist, and not a mere stepping-stone to the gist. A larger sum than the consideration rendered for the conveyance might have been recovered under the *ad damnum*, and the circumstance that the amount recovered was but the equivalent of the consideration, though not destitute of argumentative weight, is far from demonstrating that the hearing was as of a claim by a vendee for a return of purchase money *eo nomine*, on an allegation that the sale had been rescinded.

Judgment affirmed.

Mr. Justice RHODES did not express an opinion.

WOOD V. RICHARDSON ET AL.

(35 California, 149. Supreme Court, 1868.)

¹ **Implied denial of title with implied concession of the trespass.** Where plaintiff sued for damages on account of the deposit of tailings upon his claim, and the answer averred that the alleged claim of plaintiff was public mineral land, and denied that the defendant *wrongfully* deposited the tailings: *Held*, that such answer was an implied admission of the flow of tailings but a denial of the plaintiff's title.

Instruction assuming disputed facts. Where title in plaintiff is denied, an instruction speaking of the "land of plaintiff" or "plaintiff's land," recites as admitted the contested fact, and is erroneous.

Appeal from the District Court, Fourteenth Judicial District, Nevada County.

This action was brought to recover damages alleged to have been sustained by plaintiff by reason of sand and sediment washed on to a tract of six acres of land, in Bloomfield, Nevada county, on the northwest bank of Knap's creek. The complaint averred that the defendants had washed the sand, etc., out of the banks of Knap's creek above his land, and caused it to flow down upon his land.

The answer, besides the matters mentioned in the opinion of

¹ *Bradbury v. Cronise*, 9 M. R. 366; *Feely v. Shirley*, 12 M. R. 132.

the court, averred that the defendants were mining for gold, and that the land was public mineral land.

The jury found a verdict for the defendants, and the court gave judgment accordingly.

The other facts are stated in the opinion of the court.

D. BELDEN and A. C. NILES, for appellant.

A. A. SARGENT and T. B. REARDON, for respondents.

By the Court, SAWYER, C. J.

The only point made in appellant's brief is the refusal of the court to give to the jury the fourth instruction asked by the plaintiff, which is in the words following:

"That the defendants in their answer have not denied the allegation of plaintiff's complaint, that the defendants caused tailings to flow upon the land of plaintiff, and the jury are bound to consider it as an admitted fact that defendants did cause tailings to flow upon plaintiff's land."

The vice in the instruction consists in the use of the words "upon the lands of the plaintiff" and upon "plaintiff's land." The answer distinctly takes issue upon the title or ownership of the land. It both denies the title and ownership of the plaintiff, and alleges title and a right in defendants to flow the tailings upon the land described in the complaint. The answer may be construed, and perhaps intentionally so, as admitting the flowing of tailings upon the land; but it denies that this was wrongfully done. The instruction not only states that the flowage upon the land described in the complaint is admitted, but also assumes, and in terms declares, that the land is the "land of the plaintiff"—"the plaintiff's land"—and in effect, if literally construed, takes the question of the ownership of the land, the title of the plaintiff, from the jury. The title, however, was directly put in issue, and the instruction, in this particular at least, is objectionable and liable to mislead the jury. We think the court properly refused the instruction in the form presented.

Judgment and order denying new trial affirmed.

PITTSBURGH COAL MINING CO. V. GREENWOOD ET AL.

(39 California, 71. Supreme Court, 1870.)

¹ **Damages not being prayed for can not be assessed on default.** In an action to recover a tract of coal land, and for an injunction, not praying damages, damages can not be assessed against defendants in default, although the complaint states facts sufficient to sustain a judgment for damages.

Appeal from the District Court of the Fifteenth District, City and County of San Francisco.

The plaintiff commenced an action against several defendants to recover possession of a tract of coal-bearing land, and to procure an injunction. No damages were prayed for in the complaint, and none were stated or claimed in the summons. The cause was tried on the complaint and answer of two of the defendants, and judgment was rendered against all the defendants for twelve thousand five hundred dollars damages. From this judgment, Cline and Goldstine, who made no answer, brought this appeal.

THOMAS A. BROWN, for appellants.

No brief for respondent on file.

TEMPLE, J., delivered the opinion of the court.

The complaint in this case states facts sufficient to sustain a judgment for damages, but the amount of damages is not stated in the complaint, nor is there a prayer for damages. No damages are stated or claimed in the summons. The defendants, who appeal, made default, and judgment was rendered against them for twelve thousand five hundred dollars damages. This was clearly erroneous, and that part of the judgment which awards damages against the appellants must be reversed and set aside; and it is ordered that the judgment be so modified.

Mr. Justice WALLACE, being disqualified, did not participate in the decision.

¹ *Gillett v. Treganza*, 7 M. R. 432.

GREGORY ET AL. V. NELSON ET AL.

(41 California, 278. Supreme Court, 1871.)

Judgment on matters not in issue. In an action brought to obtain decree, restraining defendants from destroying plaintiffs' ditch over certain ground, which decree recited "that defendants have title and right of possession to the mining land in action, as defined in defendants' answer:" *Held*, that the judgment being upon matters not in issue, was, upon this point, superfluous and nugatory.

Idem—Judgment void for uncertainty. Where a decree recited that plaintiff had the right of way, for the purpose of conveying water across certain mining ground, without specifically defining it either in the terms of the decree, or in any of the pleadings, the recital is ineffectual as a judgment of right of way.

¹ **Judgment must be a sequence to what the pleadings establish.** In an action to enjoin the destruction of a ditch, the complaint averred ownership of the ditch; that it had been constructed over vacant ground, and a user for years; none of which allegations were denied, nor any claim of prior right or usage asserted, by which such ditch might be destroyed: *Held*, that the pleadings left an admitted and absolute right in the plaintiffs and entitled them to an unqualified decree.

² **Court can not qualify its protection to suitors.** Where a right of a plaintiff is, under the pleading and evidence, shown to be absolute, the court has no right to qualify the protection which the law gives to such right.

Idem—Injunction allowed upon bargain and condition. Where a party has shown his absolute ownership in a ditch, and the defendant shows no right to destroy it, the court can not, by its decree, allow a defendant to wash away the ditch upon building a flume and carrying its water, and giving bond to pay all damages.

The court can not license a trespass, nor compel a party to an exchange of property, upon the pretense of convenience or necessity.

Appeal from the District Court of the Second Judicial District, County of Butte.

There were no findings of fact or conclusions of law in the court below, except such as were included in the judgment.

The other facts are stated in the opinion.

W. C. BELCHER, for appellants.

HAYMOND & STRATTON, for respondents.

¹ *Bradbury v. Cronise*, 9 M. R. 366.

² *Edwards v. Allouez Co.*, 7 M. R. 577.

By the Court, SPRAGUE, J.

This is an appeal from the judgment and subsequent order of the court denying appellants' motion to modify the same. Substantially, it is but an appeal from the judgment upon the judgment roll alone.

The practice adopted by the learned judge of the district court before whom the case was tried can not be commended. What is termed the judgment in the case, instead of being a simple sentence of the law upon the material ultimate facts, admitted by the pleadings or found by the court, proceeds to adjudge and decree the existence of ultimate facts, some of which are not within the issues made or tendered by the pleadings, and then declares the judgment of the court upon the facts previously adjudged to exist.

The action was for the purpose of obtaining a judgment and decree perpetually restraining defendants from a destruction of plaintiffs' water ditch, and from the further prosecution of mining operations, in which they were engaged in such manner as to endanger the stability and security of plaintiffs' said ditch.

"The complaint is verified, and alleges that plaintiffs are the owners of certain mining claims at Cherokee Flat, and also of a certain reservoir and water privileges at or near said point, called and known as the 'Tom Jones Reservoir,' and of a certain ditch leading from said reservoir to said claims, and certain other mining claims at Cherokee Flat, to conduct the water of said reservoir to said claims for mining purposes."

This allegation is not denied by the answer.

The complaint further alleges that said ditch and ground in which the same is constructed was located for said ditch in 1856, and the ditch fully constructed and completed in the fall of the same year. This allegation is not denied by the answer.

The complaint also alleges that some of the plaintiffs were the original locators of said ditch, and that all of them now own the same by good and sufficient conveyances from the first locators, and are and have been in the actual and peaceable possession of the same since June 3, 1862, and are and have been using the same for the purposes aforesaid. This allegation is not denied by the answer.

It is further alleged that at the time said ditch was located, in 1856, and when said ditch was constructed, the ground over which it passed was vacant and unlocated, and that plaintiffs' rights in the premises are prior and paramount to any that defendants have or claim to have in the ground on the line of said ditch. This allegation is not traversed so as to put the material facts therein alleged in issue as between plaintiffs and defendants.

These averments, not denied by defendants, and hence for the purposes of the action, admitted by them, establish the plaintiffs' rights in the premises.

The subsequent averments of the complaint as to the acts and operations, intentions and threats, of defendants, as to what they had already done and were about to do tending to endanger the safety and stability of plaintiffs' ditch, and its ultimate destruction by defendants, to the irreparable injury and damage of plaintiffs, were substantially denied by the answer.

The answer does not set up any prior right in defendants to the ground over which plaintiffs' ditch was constructed, or any part thereof; neither does it set up any claim or right, derived from the customs or usages of the mining district or otherwise, to prosecute their mining operations in such manner as to endanger the safety or security of plaintiffs' ditch, destroy the same at any point, or in any manner interfere with the same against the wishes of plaintiffs. Nor does the answer set up any claim or right of defendants to any specified mining ground, or describe any mining claims whatever as belonging to defendants.

What by respondents is termed the judgment of the court upon the issues thus made and tendered by the pleadings, proceeds first to adjudge and decree "that the defendants have title and right of possession to the mining land in action, as defined in defendants' answer." Whether this be regarded as the finding of an ultimate fact, conclusion of law or judgment, it is entirely outside of any issues made or tendered by the pleadings, hence, as a finding of fact, conclusion of law, or judgment of the court upon the subject-matter embraced therein, is superfluous and nugatory: *Burnett v. Stearns*, 33 Cal. 473, 474.

The judgment then proceeds: "It is further adjudged and decreed that plaintiffs have a right of way for the purpose of conveying water across a portion of said mining ground, from the line of defendants' claim where defendants' ditch enters upon it to the point of departure of plaintiffs' ditch from the line of defendants' claim, and that the same has been acquired from and by adverse possession for more than five years last past, prior to the bringing of this action, and that the ditch, the right of way for which was thus acquired from adverse possession, was of the capacity of one hundred and fifty inches of water."

Neither the complaint, answer, nor any other portion of the record before us, defines or in any manner describes or indicates any specific mining ground or claims of defendants; hence that portion of the judgment, conclusion of law, or finding last quoted, for want of certainty and definiteness, is utterly impotent as the assertion or protection of a right of way for plaintiffs' ditch to any extent. The allegations of the complaint in relation to the acts performed and contemplated by defendants, alleged to be injurious and prospectively destructive of plaintiffs' rights in their ditch, and that defendants have entered into a conspiracy to wash down and away so much of plaintiffs' ditch as is on the ground known as the Welsh Boys' claims; that in pursuance to said conspiracy defendants had already washed off ground abreast and along the line of plaintiffs' ditch for the distance of about one hundred feet to the depth of from twenty to twenty-five feet, and for the space of about one hundred feet aforesaid had washed down the ground to within sixteen feet of said ditch, and threaten and declare that they will continue to prosecute their operations on and through the ground over which plaintiffs' said ditch is located, and wash down and away said ditch to the extent of about four hundred and fifty feet; that defendants were then mining toward and near said ditch, and in conducting their operations use a large head of water, and run the same over the surface of the ground along the line of said ditch, thereby softening the ground and rendering it liable to break, cave, and to pass plaintiffs' ditch; that defendants declare that they will continue to run water on and over said grounds there known as the Welsh Boys' claims; that if de-

defendants wash off the grounds upon which the plaintiffs' said ditch is located within the limits of the said Welsh Boys' claims, it would be a great and irreparable injury to plaintiffs, etc. These allegations are simply denied by the answer. Defendants, by their answer, do not claim to own or to have any right to work the Welsh Boys' claims, or any other specified ground or claims.

It is adjudged that the plaintiffs have a right of way for their ditch within some indefinite, undefined and intangible limits, and that such right was acquired from and by an adverse possession of more than five years next preceding the commencement of this suit. The undenied allegations of the complaint are that plaintiffs' ditch was located and constructed in the year 1856; that some of the plaintiffs were the original locators of said ditch, and that all of them now own the same by good and sufficient conveyances from the first locators as aforesaid, and are and have been in the actual and peaceable possession of the same since June 3, 1862 (the suit was commenced December 12, 1867); that at the time said ditch was located and constructed, in 1856, the ground over which it passed was vacant and unlocated, and that plaintiffs' rights in the premises are prior and paramount to any that defendants or any of them have or claim to have in the ground on the line of the said ditch. For want of denial these averments became admitted facts in the case, and any finding or judgment in the case repugnant to these facts is erroneous.

Whether plaintiffs' rights in the premises were acquired by prior location, grant or prescription—if they are adjudged to exist—the law protects them in the full enjoyment thereof.

The court next proceeds to further adjudge and decree, "that plaintiffs have no title, or right of possession, or right of working the mining grounds described, save and except the right of way to convey the said one hundred and fifty inches of water across a portion of the mining ground of defendants to claims of plaintiffs, until the claims of plaintiffs shall have been fully worked out, according to mining usages."

In view of the pleadings it is difficult to comprehend the pertinency or utility of the last quoted portion of the judgment; no issue is made or tendered by the pleadings as to the right of plaintiffs to work the mining grounds over which

their ditch is located and constructed, and no "mining ground of defendants" is specified or described either in the complaint or answer. Again: the ownership of the ditch by plaintiffs, and their right of way for the same from the Tom Jones Reservoir over and across the ground known as the Welsh Boys' claims to claims of plaintiffs "and certain other mining claims at Cherokee Flat," being established by the pleadings, we look in vain for any issue made or tendered by the pleadings to justify or authorize a judgment limiting or restricting this right of property in the ditch, and the right of way for the same, to such time as "the claims of plaintiffs shall have been worked out according to mining usages."

This court can not presume that the trial court required or permitted evidence to be introduced on the trial for the purpose of establishing or rebutting allegations of the complaint not denied by the answer; nor can it be presumed that any evidence was received by the trial court, except such as was pertinent to the issues made or tendered by the pleadings, and evidence tending to rebut such legitimate evidence.

The judgment under consideration, after having adjudged and decreed as hereinbefore recited, proceeds, upon the basis of such adjudication, to modify an absolute and unconditional order theretofore granted, restraining defendants "from washing down or damaging in any manner the ditch of plaintiffs, called the Tom Jones Ditch, at any point within or without the ground known as Cherokee Flat, * * * as the Welsh claims, and also from washing away the ground upon which said ditch is located, and from washing or working in any manner that will be injurious to said ditch," as follows: "It is further adjudged and decreed that the injunction heretofore issued in this cause be hereby [so] modified as to permit the defendants to mine the ground described in defendants' answer, fully and freely, and as of right, upon the erection of a flume of wood or metal pipe as shall be sufficient to conduct and convey one hundred and fifty inches of water across said grounds, for the use and benefit of plaintiffs, * * * and that said flume of wood or metal pipe shall be so erected or constructed as to delay the flow of the water of plaintiffs for the least practicable or reasonable time; * * * that prior to the washing and mining away of said ditch of plaintiffs,

that defendants shall file in this court a bond in the penal sum of five hundred dollars, payable to plaintiffs, to be approved by the county clerk, conditioned to pay all damages which may occur to plaintiffs by the failure of defendants to keep said flume or metal pipe in repair, until the claims of plaintiffs shall be worked out according to the usage of miners, * * * and that each party—plaintiffs and defendants—pay each their own costs in this action.

The allegations of the complaint unquestionably were entirely sufficient to authorize an injunction to the full extent prayed for, and as temporarily granted by the judge. These allegations, so far as they relate to the rights of property of plaintiffs in the ditch and reservoir, with the right of way for their ditch, as we have seen, were not denied by the answer. The subsequent allegations as to acts of defendants already performed and designed, and threatened by them to be continued, and the consequences of such acts to the property and rights of plaintiffs, if continued, are simply denied by the answer. The answer does not set up any substantive matter of defense, or claim any legal or equitable right derived from the customs or usages of the mining district or otherwise, to wash away or in an manner interfere with the plaintiffs' ditch. There is nothing in the pleadings which can serve as a legitimate foundation for, or authorize that portion of, the judgment which is styled a modification of the injunction theretofore issued. It is but a license to the defendants, upon the condition precedent of their filing their bond in the penal sum of five hundred dollars, payable to plaintiffs, to enter upon and destroy the plaintiffs' property.

If the acts and purposes of defendants, with the resulting consequences to plaintiffs' ditch, as alleged in the complaint, were established by the evidence on the trial, most clearly the court should, by its judgment, have made its preliminary injunction perpetual. On the contrary, if the evidence failed to establish that plaintiffs' right of property in their ditch were jeopardized by the contemplated operations of defendants, the injunction should have been dissolved and bill dismissed.

In support of the judgment modifying the previous injunction, it must be presumed that the evidence fully established

the allegations of the complaint as to the designs of defendants in reference to plaintiffs' ditch, for the judgment authorizes the precise thing which plaintiffs alleged defendants designed to do, and which, by their answer, they denied—upon condition that they would give their bond in the sum of five hundred dollars, conditioned that they would substitute for a limited period, for the use of plaintiffs, a flume of wood or metal pipe in place of plaintiffs' ditch, and pay such damages as plaintiffs might suffer by reason of defendants' failure to keep such flume or metal pipe in repair. But this modification or license to defendants to invade the private property and admitted vested rights of plaintiffs without their consent is entirely beyond and outside of the subject-matter submitted to the court by the pleadings, and for this reason alone the judgment should be reversed.

But even had the defendants, after having admitted the property rights of plaintiffs in their ditch, as alleged in their complaint, admitted their intention to wash away the ground upon which it was constructed, as alleged by plaintiffs, and alleged in justification of such purpose their design to substitute, in place of so much of plaintiffs' ditch as they should wash away, a flume or metal pipe for conducting the water for the use of plaintiffs, and that such flume or pipe would answer plaintiffs' purposes as well as the ditch, with a prayer that the court, by its judgment and decree, authorize them to consummate their designs, upon their filing a bond, payable to plaintiffs, conditioned to keep such flume or metal pipe in repair until plaintiffs' claims should be worked out, I know of no principle of law or power in a court of equity to justify or authorize such an invasion of the property rights of one private party to serve the wishes, convenience or necessities of another private party. Such a principle, if once adopted by judicial tribunals, upon grounds of necessity, in view of the peculiar relations and character of private property rights of miners on the public domain, would readily be invoked as applicable to other property rights, and its practical application would result in a system of judicial condemnation of the property of one citizen to answer an assumed paramount necessity or convenience of another citizen.

It is the duty of courts to protect a party in the enjoyment

of his private property, not to license a trespass upon such property or to compel the owner to exchange the same for other property to answer private purposes or necessities.

Judgment reversed, with costs, and cause remanded, with directions to the court below to render judgment, enjoining defendants substantially in the terms of the preliminary injunction, with costs.

FEELY V. SHIRLEY.

(43 California, 369. Supreme Court, 1872.)

No review of orders not in judgment roll. The ruling of the court in striking out a portion of the answer can not be reviewed upon appeal, if not made a part of the bill of exceptions or included in the statement, since it forms no part of the judgment roll.

¹ **Denial of unlawful breaking of ditch.** Where the fact that defendant "wrongfully" broke a flume is denied, the fact that he broke it is admitted and no proof of breaking is required; and conceding plaintiff's right of property in the flume would entitle him at least to nominal damages upon the pleadings.

Appeal from the District Court of the Third Judicial District, Santa Clara County.

The complaint averred that the plaintiff was the owner and in possession of a ditch and flume, constructed for conducting water, and that he had for a long time been conveying water in the same for irrigating his land, and that the defendant wrongfully and unlawfully pulled down and destroyed the flume and diverted the water. There was a prayer for an injunction and for judgment for damages.

The answer denied that the defendant wrongfully and unlawfully pulled down or destroyed the flume and ditch.

The court, on motion of the plaintiff, struck out a portion of the answer.

The defendant filed a statement and moved for a new trial, and appealed from the judgment and from an order of the court below denying a new trial.

¹ *Wood v. Richardson*, 12 M. R. 121.

In the printed transcript, the appellant included in the judgment roll the respondent's notice of motion to strike out a portion of the answer and the order made by the court granting the motion, but said notice and order were not made a part of the bill of exceptions or included in the statement.

The other facts are stated in the opinion.

C. C. STEPHENS, for appellant.

BELDEN & YOUNGER, for respondent.

By the Court, NILES, J.

The ruling of the court in striking out a portion of the answer can not be reviewed upon this appeal, since it forms no part of the judgment roll: *Dimick v. Campbell*, 31 Cal. 238; *Moore v. Del Valle*, 28 Cal. 174.

The motion for a nonsuit was properly denied. The breaking of the flume was distinctly alleged in the complaint, and the answer took issue upon the wrongful character of the act merely, but did not deny its commission. The breaking was, therefore, an admitted fact; and, conceding the plaintiff's right of property in the flume, no proof of the breaking was requisite to establish his right to recover at least nominal damages.

The testimony in the case was conflicting, and there appears sufficient testimony to support the findings of the court upon all the issues made by the pleadings.

Judgment and order affirmed.

FIRST NATIONAL BANK OF HELENA V. HOW ET AL.

(1 Montana, 604. Supreme Court, 1872.)

Fraud that impeaches the consideration of a promissory note constitutes a defense to an action at law on the note.

Vendee surrendering property to adverse claimant. One who buys machinery which is in litigation, giving his note in payment therefor, commits fraud on the vendor by delivering possession and executing conveyance of his right thereto, to the party holding the adverse title, upon mere demand without legal compulsion, and can not afterward plead, as a defense to the note, the fraudulent conduct of the vendor in selling the property.

Idem—Pretended failure of consideration. In an action upon a note, the maker does not show failure of consideration by alleging that the payee had no title to the property, in payment of which it was made, where it further appears that the maker had delivered to a claimant, without legal necessity, the property which he had bought and received from the payee.

Insufficient averment of fraud. The allegation in a pleading that a certain suit was corruptly and fraudulently dismissed, is not sufficient. The facts constituting the fraud must be set forth.

Refusal to allow amended answer. It is no abuse of legal discretion in the court to refuse to allow defendant to file a second amended answer, the affidavit not showing what the defense is nor why it was not interposed before.

Appeal from the First District, Madison County.

In April, 1872, the court, Murphy, J., sustained the motion of plaintiff for judgment on the pleading, and refused to allow the defendants, How *et al.*, to file another amended answer.

The answer alleged that the only consideration of the note sued on was the sale and delivery to How of certain machinery; that plaintiff, at the time of the execution and delivery of the note, falsely and fraudulently stated and represented to How that the plaintiff was the legal and rightful owner of the property, and had the full right to sell the same; that How, relying on these representations, executed the note sued on; that the only title of plaintiff to the property, at the time of the execution of the note, was derived by a pretended sale and delivery of the property to plaintiff by Cole Sanders, who had possession of the same as agent of the

"Cole Sanders Mining Company;" that said Sanders had no right to so sell and deliver the property, which belonged solely to the company, and was employed by the company as its agent in putting up said machinery and using the same in quartz milling; that plaintiff well knew the foregoing facts; that Sanders became indebted individually to plaintiff for purposes not embraced within his employment as such agent; that plaintiff fraudulently colluded to defraud the said company of said property, and that said Sanders, with fraudulent design and without any power or authority, sold and delivered said property to plaintiff in consideration of said individual indebtedness; that plaintiff commenced an action against said company to procure the title of the company to the property, and agreed to prosecute the same to judgment; that How relied upon such prosecution, and that said note would not have been made if plaintiff had not made this inducement; that plaintiff, after the execution of the note, wrongfully and fraudulently dismissed said action, and has failed to procure any adjudication of the title to said property, as against said company; that plaintiff procured the execution of said note to defraud the defendants of the moneys mentioned in the note; "and defendants aver that the said Cole Sanders Mining Company, by virtue of their said superior title, has demanded and claimed possession of said property from defendant How."

The answer contained a counter-claim, and demanded judgment against plaintiff for \$8,000 damages sustained by defendant How in the transportation and erection of said property for the purpose of crushing quartz.

The other facts appear in the opinion.

W. F. SANDERS and S. WARD, for appellants.

E. W. & J. K. TOOLE, for respondent.

KNOWLES, J.

The only points presented in this case are the sufficiency of the answer of the defendants, and the refusal of the court below to permit the defendants to file an additional amended answer.

The defendants admit the execution of the note sued, and deny that John S. Atchison, cashier, assigned, for a valuable consideration, this note to plaintiff, or delivered the same to it. This denial would, perhaps, be sufficient to raise an issue as to whether the assignment was for a valuable consideration. The defendants, however, in another part of their answer, aver that they "executed and delivered to the said John S. Atchison, as cashier and agent of plaintiff, and for the sole use and benefit of plaintiff, the said promissory note sued on." Admitting this averment to be true, and the plaintiff is the rightful owner of the note, and under our statute the proper party plaintiff, although the assignment of the note to plaintiff may not have been for a valuable consideration.

We come now to the consideration of whether the answer sets up other facts which constitute a defense to the action on the said note.

Both plaintiff and defendants seem disposed to treat, in their arguments, the allegations of the answer as setting up the defense of fraud. We do not feel disposed to enter into the discussion as to whether this defense is an equitable one or not, and therefore inadmissible, under our organic act, to be interposed to this action on a promissory note. Undoubtedly fraud can be set up as a defense to an action at law on a promissory note, that is, any fraud that would impeach the consideration for which the note was given. The fraud presented in this case by the answer of the defendants is, that the plaintiff sold the defendant How certain quartz mill machinery, for which, as a security for the payment of the consideration, this note was given, but that plaintiff had no title to said property. That the same was owned by a corporation known as the Cole Sanders Mining Company, incorporated under the laws of the State of Missouri. That plaintiff purchased this property from Cole Sanders, an agent of the said corporation, and that he had no authority to sell the same. That at the time of the sale plaintiff knew that it had no title to said property, and that the said Cole Sanders had no authority to sell the same.

The answer shows that plaintiff agreed to prosecute an action to declare the title to the said property to be in plaintiff, and not in said corporation, and that a suit was pending for that purpose when plaintiff sold defendant How this

property, but that plaintiff, disregarding this agreement fraudulently dismissed said action.

When a party sets up fraud, he must come into court with clean hands and show that he is entitled to avail himself of the fraud alleged. As we have seen, the defendants show by their answer that they had been apprised that there was some dispute about this property; that an action was pending, concerning the same, against the Cole Sanders Mining Company.

The defendants aver "that the Cole Sanders Mining Company, by virtue of their said superior title, has demanded and claimed possession of said property from defendant How, and that said defendant How has released, relinquished and conveyed to said corporation all his title and possession and right of possession of the said property derived under and by virtue of the said sale."

This was not a proper course for the defendant How to have pursued on a simple demand from the Cole Sanders Mining Company for said property, although that company may have had the best title to the same. The proper action on the part of the defendant How would have been to have delivered or offered in good faith to deliver back the property to the plaintiff, as soon as he discovered that the plaintiff had no title to said property and that a fraud had been committed upon him, unless in some manner he was prevented from so doing. He had no right to pursue such a course as to place the plaintiff in a more unfavorable position in regard to the property than he would have been had he never sold the same to him. The mere demand of the Cole Sanders Mining Company was not sufficient to have prevented the defendant How from delivering or offering to deliver the possession of the property back to plaintiff, much less was it sufficient to compel the said How to not only deliver the possession of said property, but to make a conveyance of the same to the said company of his title and interest. Possession of property is of some value. The possessor of property may never be compelled to deliver the same to the one holding the paramount title. The conduct on the part of How we hold was such as will preclude him and his sureties from coming in and setting up the fraud complained of. The said How has committed a wrong against the plaintiff by his conduct in the premises. It

may be urged that, as the answer must be taken as true, there was no wrong in the action of the defendant How, because the plaintiff had no title to the property as appears by the answer. The reply to this is that the defendant How, having received the possession of this property from the plaintiff, had no right, unless by a legal compulsion, to deliver the property to the other contestant therefor. That although the plaintiff may have had no title to the property it had the possession thereof, and How had no right to act in such a manner as to deprive it of regaining this. Such a proceeding as that of the defendant How would be but a short way of taking property from the possession of one claimant and delivering it to another, and then force the one who had been deprived of the possession of the same and the use and enjoyment thereof to litigate the title to the property on an action on the promissory note given as a security for the payment of the consideration therefor. No court would be warranted in supporting such a proceeding. It is inconsistent with fair dealing on the part of the defendant. He must have his hands clean to entitle him to set up the fraud complained of.

It does not appear how the defendants were damaged by a failure to prosecute the suit to test the title to the property between the plaintiff and the Cole Sanders Mining Company. The dismissal of the suit may have been the natural result of the plaintiff parting with the possession of the property and its title to the same. The mere allegation that such dismissal was corruptly and fraudulently done amounts to nothing without showing the fraud. The facts that constitute fraud must be set forth.

It is claimed in the argument of appellants that the allegations of the answer amount to the setting forth of a failure of consideration. We should be more inclined to treat the answer as setting forth such a defense did it not contain the allegations that the plaintiff knew it had no title to said property at the time of the sale of the same; that it purchased the same from an agent of the Cole Sanders Mining Company, who had no authority to sell the same, which the plaintiff well knew.

Treating this answer, however, as an attempt to set up failure of consideration, namely, failure of title of the property

for which the note sued on was given in consideration, and does the answer present a complete defense of this kind?

It does not appear that, by any legal action, the plaintiff had been adjudged to have no legal title. It does not appear that the Cole Sanders Mining Company had obtained the possession of said property through any legal process. All that does appear is, that the said mining company demanded possession of one of the defendants, John How, of said property, and that in pursuance of this demand he not only delivered possession thereof to said company, but he conveyed to it all his right, title and interest thereto. We hold that this does not show a failure of consideration. To warrant a party in delivering possession of property to a claimant thereof, that he has received possession of from another by virtue of a sale, there must be some legal necessity for him to do so. That he can not act thus on a simple demand and then claim that the title has failed. It has frequently been held, in cases of the sale of lands, that the defendant, in an action on the consideration therefor, can not set up a failure of title as a defense to the action without showing an eviction. Personal property comes under the same rule as real estate when a defendant seeks to avail himself of a failure of title. We do not hold, however, that it is actually necessary for a defendant, in such an action, to show an eviction, but we do hold that the title must have failed and that possession can no longer be maintained, or that he has delivered, or offered to deliver, the property back to his vendor, or show some good reason for not doing so. Although the defendants may have been apprised of an outstanding title, and may have believed that this was the paramount title, and, in fact, it may have been, they had no right to deliver possession of the property to this claimant without some legal necessity for it. No such necessity existed at the time and there may never have been such a necessity.

For these reasons we think the answer of the defendants did not state facts sufficient to constitute a defense, and that the plaintiff was entitled to a judgment on the pleadings.

The refusal of the court below to permit the defendant to file an amended answer is assigned as error.

The refusal to allow a party to amend his pleadings rests in the sound legal discretion of the court to whom the applica-

tion is made, and this court can only review that ruling when it appears that there has been some abuse of that discretion. It appears that the defendants had obtained permission before to amend their answer, and that the answer in this cause was filed in pursuance of that permission.

The attorneys for the defendants make affidavit on their second application to amend their answer, that the defendants, in their judgment, have a good defense to the action, but these affidavits do not show what that defense is, and why it was not interposed before, although from their affidavits it would appear that such defense must have been within their knowledge.

Under such circumstances we can see no abuse of discretion in refusing to allow this second amendment of defendants to their answer.

For these reasons the judgment of the court below is

Affirmed.

GREEN ET AL. V. THE OPHIR COPPER, SILVER AND
GOLD MINING CO.

(45 California, 522. Supreme Court, 1873.)

Error without injury. Erroneous instructions are no ground of reversal when it is apparent that the verdict would have been the same with correct instructions.

If a plaintiff is entitled to a verdict on the evidence, erroneous instructions on the law can not prejudice the defendant.

¹ **Admissions of president acting as viewer.** In a former trial and between other parties, the president of the corporation, defendant, was selected by his company to go with the jury to examine the premises: *Held*, that his declaration made at the time as to the company not claiming a certain part of the ledge was relevant in a subsequent suit by a party claiming the ground referred to by the president of the company.

Appeal from the District Court of the Fourteenth Judicial District, County of Placer:

During the trial of this cause, plaintiffs offered testimony

¹ *Shay v. Tuolumne Co.*, 5 M. R. 587.

tending to prove that the defendant and a company called the Good Friday Company had a law suit in the District Court of Placer County, in 1867, concerning the property now claimed by defendant, and called the Good Friday ground; that during the progress of the trial an order was made that the jury then summoned to try the case proceed to view the premises in dispute; that Daniel Choate was selected on the part of the defendant, the Ophir Copper, Silver and Gold Mining Company, to point out the ground claimed by them; that said Choate was then the president of said company; that he did proceed with the jury, and did point out the grounds then claimed by the Ophir Copper, Silver and Gold Mining Company; that G. McCready and H. Baldwin were two of the jury at that time.

Plaintiffs then called the said McCready and Baldwin, who each testified that, while on the ground, the said Choate, in pointing out the premises claimed by his company, did point out the ground now in dispute, and did then and there, while so upon the ground upon said business, say, that the Ophir Copper, Silver and Gold Mining Company did not claim that ground as part of their ground or claim.

The defendant's attorney objected to the testimony as irrelevant, and because the defendant was not bound by the declaration made by its president as to its ownership or claim of property, and that such declarations are not admissions which could take away defendant's property.

Plaintiffs' attorney then stated that it was not claimed by the plaintiffs that such was the case, or that the president could, by any such declaration, affect the rights of the corporation; but that the testimony was offered as a declaration by an agent and officer of the corporation, while on the ground, in and about the business of the corporation, as to the extent of their claim and the boundaries thereof.

The court admitted the testimony for that purpose, to which ruling defendant excepted.

CHARLES A. TUTTLE, for appellant.

JO HAMILTON, for respondents.

By the Court, BELCHER, J.

This is an action to quiet the title to a quartz mining claim in Placer county. In their complaint the plaintiffs allege that they and their grantors have owned and been in the possession of the mine commonly called the "Green Mine," but sometimes known as the "Fred Mallet Mine," since the month of October, 1867; and that the mine extends in length eleven hundred and thirty-one feet and five inches, and in width, including dips, angles and variations, one hundred feet on each side of the ledge; that the defendant claims to own the whole mine, and has made application for a patent therefor from the Government of the United States.

In the answer, the defendant alleges that it has owned and been in the possession of a mineral-bearing ledge of quartz, known as the "Granite Edge Lode or Ledge," since the year 1863; and that its claim extends in length more than two thousand feet, and has a width, including spurs, dips, variations and angles, of three hundred feet on each side of the ledge; that the claim described in the complaint, with the exception of a small portion at the west end thereof, is all within the boundaries of the defendant's claim, and is owned by the defendant and not the plaintiffs.

From the testimony submitted on the part of the plaintiffs, it appeared that in October, 1867, J. H. Mallet and his associates located upon a ledge known as the "Peter Walter Ledge," a claim of one thousand feet in length, by posting upon the ledge, in accordance with the custom of the miners in that district, a notice by which they claimed five hundred feet each way from the notice; that they immediately commenced work by sinking a shaft on the ledge near the notice, and continuously prosecuted the work till the month of June, 1868, when they sold and conveyed to the plaintiffs; that the plaintiffs had worked continuously on the ledge, from the time of their purchase to the time of the trial, and had claimed the ground during all the time under the said conveyance adversely to the defendant and to all others, and had expended about thirty thousand dollars in sinking shafts, running levels, and erecting machinery thereon.

The plaintiffs' testimony also tended to prove that the

plaintiffs' ledge extended the whole distance claimed by them, and was a distinct and separate ledge from that claimed by the defendant; that the two were parallel ledges, and that by the custom of miners in that district, locators of quartz ledges were entitled to one hundred feet on each side of the ledge for convenience of working.

On the part of the defendant it was claimed, and the testimony tended to prove, that in the year 1863, certain parties located the ledge now claimed by the defendant, for the purpose of mining for copper, and shortly thereafter conveyed it to the defendant, a corporation then formed by them; that, by the custom of miners, locators of copper mining claims in that district were entitled to three hundred feet on each side of their ledge or vein for the purposes of working the ledge, but that a location only covered one ledge or vein; that the plaintiffs' ledge was within the three hundred feet claimed by the defendant upon the northerly side of its ledge; that, after being prospected, the defendant's ledge was found not to contain copper, but to contain gold-bearing quartz, and the owners then determined to hold and work it as a gold mine; that the defendant had continued to perform work on the claim every year since its location, and had sunk shafts, run tunnels, and erected machinery thereon at an expense of more than fifteen thousand dollars.

The defendant's testimony also tended to some extent to show that the plaintiffs' and defendant's ledges were not separate parallel ledges, but that they converged together and would meet and unite or cross each other within the limits of the plaintiffs' claim.

The plaintiffs recovered judgment, and the appeal is from the judgment and from an order denying a motion for a new trial.

1. It is shown by a clear preponderance of the evidence that the plaintiffs' ledge is a different one from that of the defendant, and that the two are parallel and not converging ledges. Looking at the testimony as it is presented to us upon this question, we do not see how the court below could have refused to grant a new trial, if the verdict had been for the defendant. If it be conceded then that the court erred in its instructions to the jury in reference to the Statute of

Limitations, it was an error which did not prejudice the defendant. And it is the settled rule of this court not to reverse judgments for errors in instructions, when it is apparent that the verdict would have been the same with correct instructions.

2. Nor do we see any error in admitting the testimony of McCready and Baldwin. It was quite competent, we think, to prove that in a former trial between the defendant and another company, in reference to the property now claimed by defendant, the jury were ordered to view the premises, and that the president of the defendant was selected on behalf of his company to accompany them and point out the ground claimed by the defendant, and that being upon the ground for that purpose he pointed out the ground now claimed by the plaintiffs, and said his company did not claim it as a part of its claim. This testimony was relevant and tended to show that the ledge in controversy in this action was not then owned or claimed by the defendant.

Judgment and order affirmed.

¹WOODBURY v. DELOSS.

(65 Barbour, 501. New York Supreme Court, 1873.)

Release by one out of several defrauded. When one of three parties injured by the fraud of defendant has released his claim for damages, a right of action remains to the other two, who may sue in their own names.

Assignment. A right of action growing out of fraud by the defendants is assignable.

²**Joinder of counts.** A count for money had and received may be joined with a count upon the deceit where the liability under either grows out of the same transaction.

Appeal from a judgment of a special term, overruling demurrers to the complaint.

The first count in the complaint contains a cause of action

¹ Reported in 1 Sup. Ct. R. 20 (Thomp. & Cook) as *Woodbury v. Delap.*

² *Fraser v. Sears Co.*, 12 M. R. 98.

to recover damages for fraud and deceit in the sale to William Woodbury, Benjamin McLean and John P. Darling, of an interest which the defendant represented that he owned in a lease of oil lands in the State of Pennsylvania. The falsity of the representations, the procurement by the means of them of the price agreed to be paid for the interest, and that by reason of the fraud the plaintiff sustained damages, are averred.

By the agreement the defendant was to convey the interest in the lease to John P. Darling for the benefit of the purchasers, and the conveyance was made accordingly.

It is further alleged that Woodbury & McLean assigned to the plaintiff all their rights, legal and equitable, in and to the money paid to the defendant for the interest in the lease, and to all claims they and each of them had against the defendant, growing out of the purchase of such interest. And Darling released the defendant from all claims he had against him, growing out of the matters aforesaid.

The complaint contains a second clause of action on what is called an implied covenant that the defendant had the interest in the said lease that he pretended to sell to Woodbury, McLean and Darling.

There is a third count, for money paid to the defendant by Woodbury, and another for the money paid by McLean; which sums they have severally assigned to the plaintiff.

The defendant demurred to the complaint on the grounds, among others, that the court has not jurisdiction; that Darling should be joined as plaintiff, and that several causes of action have been improperly united in said complaint; and it does not state facts sufficient to constitute a cause of action.

The special term overruled the demurrers, holding that the first count of the complaint contained a cause of action for deceit in inducing Woodbury, McLean and Darling to enter into the contract, and that there was no misjoinder of causes of action stated in it.

The defendant appealed from this decision.

MULLIN, P. J.

The first count in the complaint contains a cause of action to recover damages for fraud and deceit in the sale to William

Woodbury, Benjamin McLean and John P. Darling, of an interest which defendant represented that he owned in a lease of oil lands in the State of Pennsylvania. The falsity of the representations, the procurement by means of them of the price agreed to be paid for the interest, and that by reason of the fraud the plaintiff sustained damages, are averred.

By the agreement the plaintiff was to convey the interest in the lease to John P. Darling for the benefit of the purchasers, and the conveyance was made accordingly.

It is further alleged that Woodbury and McLean assigned to plaintiff all their rights, legal and equitable, in and to the money paid to defendant for the interest in the lease, and to all claims they and each of them had against the defendant growing out of the purchase of such interest, and Darling released defendant from all claims he had against him growing out of the matters aforesaid.

The complaint contains a second cause of action, on what is called an implied covenant that defendant had the interest in the said lease that he pretended to sell to Woodbury, McLean and Darling.

There is a third count for money paid to defendant by Woodbury, and another for the money paid by McLean, which sums they have severally assigned to plaintiff. The defendant demurs to the complaint on the grounds, among others, that the court has not jurisdiction; that Darling should be joined as plaintiff, and that several causes of action have been improperly united in said complaint, and it does not state facts sufficient to constitute a cause of action.

The special term overruled the demurrers, holding that the first count contained a cause of action for deceit in inducing Woodbury and McLean and Darling to enter into the contract, and that there was no misjoinder of causes of action, because there was no other cause of action stated in it. The defendant appeals.

The court below was right in overruling the demurrer. The first count contains a cause of action for the deceit, and it was assignable: *Johnston v. Bennett*, 5 Abb. N. S. 331; *Haight v. Hayt*, 19 N. Y. 464.

As but two of the three purchasers of the interest in the lease assigned to the plaintiff, and as the purchase was by the three

jointly, there is a defect of parties unless it is cured by the allegation in the complaint that Darling released the defendant from liability to him.

It was decided in *Baker v. Jewell*, 6 Mass. 460, that if a defendant, liable to several persons for damages for a tort, settles with one of them, the action is thereby severed, and the other injured parties may maintain actions for their damages.

It was also held, in that case, that a false and fraudulent affirmation made by a seller of an estate to two or more purchasers is, in its nature, a several tort to each, and they can not join in actions therefor. If this is the rule in this State, the plaintiff could maintain the action as the assignee of either Woodbury or McLean.

In any view of the question, the first count contains a cause of action. I agree with the court below that the second count contains no cause of action. But I can not agree that the third and fourth counts do not contain causes of action.

It seems to me that the allegation that defendant is indebted to him for money had and received of defendant by Woodbury and of McLean, "on," etc., "as above stated," incorporates the allegations of the first count into the other containing such reference, and renders them counts for money had and received by means of false and fraudulent representations: 1 Chitty's Pl. 113, 385. And as the liability grows out of the same transaction as is alleged with that contained in the first count, they are properly recited: Code, Sec. 161.

The order of the special term is affirmed, the defendant to have leave to answer.

QUINCY COAL CO. v. HOOD, Adm'r.

(77 Illinois, 68. Supreme Court, 1875.)

By pleading over, after demurrer overruled, plaintiff waives all right to arrest of judgment for insufficient declaration.

Next of kin named in declaration. In an action by an administrator for damages on account of death by negligence, where the declaration describes the next of kin to be the father, the court can not admit proof of loss to other relatives.

Prerequisite to recovery on account of death by negligence. Under the statute giving an action for wrongfully causing the death of a human being, there must concur the wrongful act, causing the death under such circumstances as would have entitled the intestate to action if death had not ensued, and the survival of the widow or some person next of kin; both these facts being proved, the plaintiff is entitled to nominal damages at least.

¹ **Where the next of kin are collateral relatives of the deceased, who have not been receiving from him pecuniary assistance, and are not now in a situation to require it, only nominal damages can be given; but where they were dependent on the deceased for support, they are entitled to compensatory damages without regard, in either case, to the distance of the relationship.**

Dependency on deceased for support. In the case of collateral kindred it will be admissible for the defendant to controvert the fact of dependency upon the deceased for support; and in case of a father as the next of kin, to show that he was not entitled to the services of his minor child, in reduction of the damages.

Duty of company to protect gangway—Notice to overseer. Where the servant of a mining company was killed by the falling of a rock from the roof of a common gangway in a coal mine, and it was sought to charge the company with negligence in not keeping the roof in safe condition, it was *held*: that notice to the superintendent of the dangerous condition of the roof, was notice to the company; and if this was long enough before the accident to have given time to repair the same, was sufficient to fix negligence upon the company.

The primary object of pleading is to apprise the opposite party of the nature of the plaintiff's claim or the defendant's defense; in other words, to apprise the opposite party of what he will be called upon to meet upon the trial.

Every essential fact issuable. It is an elementary rule of pleading, that every fact essential to a cause of action is issuable, and must be proved upon the trial substantially as alleged, unless admitted by the defendant.

¹ *Hagen v. Kean*, 3 Dill. 124; *Rutter v. Mo. Pac. R'y*, 81 Mo. 169; *Lockwood v. N. Y. R. R.*, 98 N. Y. 523.

Appeal from the Circuit Court of McDonough County; the Hon. CHAUNCEY L. HIGBEE, Judge, presiding.

C. F. WHEAT and D. G. TUNNICLIFF, for the appellant.

WM. H. NEECE, for the appellee.

MCALLISTER, J., delivered the opinion of the court.

John Allen Hood, being a minor, of the age of fourteen years, was killed by the falling of a rock from the roof of a common gangway at the foot of the shaft of appellant's coal mine, and while in the employment of the latter in shoving cars in the mine. Appellee, his father, taking out letters of administration, brought this action under the act of 1853, to recover damages upon the ground of negligence in the employer in not supplying a safe support for the roof of said gangway.

The declaration contains two counts, in each of which the age of deceased was stated, and the only allegation in respect to deceased leaving widow or next of kin, in either count, is, that he left plaintiff, his father, to whom the damages recovered can be distributed.

There was a demurrer to the declaration which was overruled, and plea of not guilty filed.

On the trial it appeared that deceased left a mother as well as father, and five brothers and sisters, and upon request of plaintiff's counsel the court instructed the jury that if they found defendant guilty, then they should assess the plaintiff's damages at the amount of the pecuniary loss sustained, if any, by the next of kin to deceased, "that is to say, his father, mother, and brothers and sisters."

The jury, finding the defendant guilty, assessed the damages at \$1,142.

A motion for new trial and in arrest of judgment was made and overruled. Judgment passed upon the verdict, from which the defendant appealed, and numerous points are urged for reversal.

We do not understand appellant's counsel as insisting here that the motion in arrest of judgment should have been allowed for insufficiency of the declaration. They are precluded

from assigning error for the denial of that motion, because they demurred to the declaration and pleaded over after decision overruling the demurrer: *Am. Express Co. v. Pinckney*, 29 Ill 392. The question which they raise is not affected by the ruling in that case. It is, that the plaintiff, having specified himself in the declaration as the only next of kin left by deceased, and alleged that the latter was a minor, and he his father, it was incompetent, and calculated to take the defendant by surprise, to enlarge the scope of damages on the trial by proving, and the jury taking into consideration, other next of kin whose right to damage must be based upon another and different ground from that of the father.

The declaration limited the next of kin to the father. The plaintiff introduced proof, against defendant's objections, of others, viz., a mother and five brothers and sisters.

The court expressly instructed the jury that if they found defendant guilty, they should take into consideration, in assessing damages, the pecuniary loss of the mother, brothers and sisters.

The precise question is whether, under the rules of pleading and evidence, it was competent, where the plaintiff had specified only one next of kin—the father—to prove that there were others, and superadd their pecuniary loss to that of the father.

The statute declares that the amount recovered shall be for the *exclusive* benefit of the widow and next of kin of the deceased. Whatever might have been the claims of natural justice, the common law recognized no pecuniary interest in the life of any member of a family. But the theory of the statute is, that the widow, if there be one, and next of kin, or the latter only, if the deceased had no wife, have a pecuniary interest in the life of the person killed; the right is not extended to creditors, or anybody else not belonging to the class designated. If no one be left of such class, then there is no interest to be affected. The value of that interest is the amount which a jury may ascertain to be the damages sustained by some of that class in consequence of the destruction of that life in which they had such pecuniary interest, and the statute declares what shall be the measure of such damages, which is such sum as the jury shall deem a fair and

just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding \$5,000.

When all the provisions of the act are regarded, it is apparent that, by its force alone, a legal pecuniary interest is created in favor of certain members of a family in the life of another upon whom the former may be dependent for support, or to whose services one of the former may be entitled, and that interest is invested with all the essential attributes of property, subject to the laws for the distribution of personal estate. In this last particular, alone, consists a similarity between this action and an ordinary action by an administrator; while the action itself is purely statutory, there is nothing in the act giving it which expressly or impliedly affects any of the established rules of pleading and evidence.

All of the ingredients which must necessarily concur to give a cause of action are, wrongful act, neglect or default of the defendant, causing the death of the intestate under such circumstances as would entitle him to maintain an action if death had not ensued, and he must have left a widow or next of kin. These are indispensable prerequisites to a cause of action, and being shown, they entitle the plaintiff bringing the action as required, to nominal damages at least. But the fact of the survivorship of a widow or next of kin, being an essential element of the cause of action, renders it indispensable that it should be alleged in the declaration, and it was so decided in *Chicago and Rock Isl. R. R. Co. v. Morris*, 26 Ill. 400.

It is an elementary rule of pleading, that every fact essential to a cause of action is issuable. It is equally a fundamental rule of our system of practice, that whatever it is indispensable to allege in order to entitle a party to recover, must be proved upon the trial, unless admitted by the defendant, and it must be proved substantially as alleged.

It will not be denied that the primary object of pleading is to apprise the opposite party of the nature of the plaintiff's claim, or the defendant's defense, or, in other words, to apprise the opposite party of what he will be called upon to meet upon the trial, and the policy of the general rules of pleading is the promotion of that object.

If the fact of survivorship of a widow or next of kin be an

essential element of the cause of action, necessary to be alleged and proved on the part of the plaintiff, it follows that the allegation and proofs of the plaintiff in this behalf may be controverted by the defendant. If so, why, under the rules of pleading, should not the names of those claiming to be invested with the pecuniary interest in the life of the person killed, by operation of the statute, be stated? The suit is brought to recover for the destruction of a life in which they had such interest, and consequent deprivation of the benefits of that interest. The plaintiff is bound to allege there was some such person surviving, and, under the general issue, the burden is upon him of proving it. When he brings the action, therefore, he assumes to know there was some such person, and what hardship can there be in requiring him to state who it is?

There is no instance we can call to mind, where, in an action to recover damages for taking property, or for the deprivation of a legal right or interest, the person to whom such property belonged, or in whom such right or interest is invested, is not required to be named in the declaration; and where one is named, it is exclusive of others not mentioned.

The father being named in this case, the person killed being his son and a minor, the *prima facie* damages to the father would be the loss of services to which he was entitled. But suppose the defendant came prepared to show that the father had legally emancipated the deceased, and thus divested himself of the right to his services, would it not be competent to give such matter in evidence upon the question of damages? But even that might not disentitle the father from all damages beyond nominal, there being no widow or other next of kin, if he was nevertheless dependent upon deceased for support.

In *Chicago & Alton R. R. Co. v. Shannon*, 43 Ill. 346, this court said: "If, then, the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin had been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may

be, there has been pecuniary loss, for which compensation, under the statute, must be given. So, also, if the deceased was a minor, and leaves a father entitled to his services."

In the case of collateral kindred here supposed, it would be admissible for defendant to controvert the fact of dependency upon deceased for support; and in the case of the father, to show he was not entitled to the services of his minor child during any of the time of his minority. This must be so, because the measure of damages is what the jury, under all the circumstances, ought to deem to be a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person.

Hence, it will be perceived, both the basis and amount of damages depend upon circumstances of relationship and dependency for support, which may be various in character and degree.

If there had been a general allegation that deceased left a widow, or that he left next of kin, without naming or specifying the person, or alleging any more specific relationship, the admissibility of evidence upon the trial would depend upon an entirely different principle. No question of either variance or surprise could be raised. But the pleader having named the father, and defined his relationship to the deceased, as showing the pecuniary interest in the deceased, which had been taken away, the defendant would be justified in supposing that to be the only interest affected, and come prepared to meet the case as made by the declaration.

The introduction upon the trial, of the interests of other next of kin, under such a declaration, would have a clearer tendency to work surprise upon the defendant than the ordinary case of proving special damages without averring them, for, in the latter case, the damages, whether general or special, must be the natural consequence of the act complained of. The general rule is that the plaintiff is entitled to recover, as a recompense for his injury, all the damages which are the natural and proximate consequence of the act complained of. Those which *necessarily* result from the injury are termed general damages, and may be shown under the general allegation at the end of the declaration. But such as are the *natural*, although not the *necessary*, result of the injury, are

termed special damages, and must be stated in the declaration, to prevent surprise upon the defendant; and being so stated may be recovered: *Vanderslice v. Newton*, 4 N. Y., 130. Here the distinction is only between consequences which are the *necessary* result of the act complained of, and those which are not. In the case at bar, from the frame of the declaration, the defendant would be misled into the belief that the person specified was the only one upon whose interest in the life destroyed, damages would be predicated.

The court are of opinion that the exception is well taken. The others, however, will be overruled. The declaration is to be taken as stating a cause of action, and in respect to the negligence complained of is broad enough to admit the evidence given.

The omission in plaintiff's instruction to submit the question to the jury whether plaintiff was administrator, was immaterial. Letters in due form had been given in evidence. There was no ground upon which their validity could be assailed.

The defendant had a superintendent of the mines and work in charge. Evidence was given tending to show notice in him of the dangerous situation of the roof of the gang-way, at the bottom of the shaft. This was notice to the company, and it was long enough anterior to the accident to fix negligence upon the company.

Whether contributory negligence was imputable to deceased, a witness of the name of Slocum gave testimony tending to show the boy knew of the dangerous situation of the roof. We can not say but the jury were justifiable in disbelieving that witness upon the inherent improbabilities of his story or from his manner of testifying. Besides, upon that question, there was evidence tending to show a promise by the superintendent to have the rock removed, thus taking the risk upon the master during the time following the notice, and promise to repair: *Whart. on Neg., Sec. 220*.

The age, and the circumstance of the boy being under the control of his father, were also to be considered.

We express no opinion as to the damages being excessive, but for the error pointed out the judgment will be reversed and the cause remanded, with leave to plaintiff to amend his declaration.

Judgment reversed.

KNARESBOROUGH V. BELCHER SILVER MINING Co.

(3 Sawyer, 446. U. S. Circuit Court, District of Nevada, 1885.)

¹ **Sufficient allegation of the fact of negligence.** The plaintiff sued for injuries caused by a defective platform upon which he was at work, and in his complaint alleged that the defendant provided the platform negligently, but did not allege that defendant knew of the defect, nor that plaintiff was ignorant of it. *Held*, that the complaint stated a good cause of action, and that the plaintiff in making out his case could not be required to show a want of concurring negligence, the proof of which should rest with defendant.

² **Employes of corporation—When not fellow-servants.** It is not law "That the defendant, being a corporation, and unable to act otherwise than by means of servants, all persons employed by it in the same general business, must necessarily be fellow-servants, within the rule exempting the master from liability for the negligence of one servant to another."

Before Justice FIELD, and HILLYER, District Judge.

The plaintiff sues for injuries received while in defendant's employment; the injuries were caused by a defective floor or platform upon which he was at work, and it is alleged in the complaint that the defendant provided this insecure and defective platform negligently. There is no allegation in the complaint that the plaintiff did not know, or that the defendant did know, that the floor was defective and insecure.

To this complaint a demurrer is filed for two causes: First, for the want of an allegation of knowledge on the part of defendant, and a want of it on plaintiff's part, that the floor was defective. And second, because the injury, if any, resulted from the negligence of plaintiff's fellow-servants.

LINDSAY & DICKSON, for plaintiff.

WHITMAN & WOOD, for defendant.

By the Court, HILLYER, J.

That the plaintiff is not, in making out his case, required

¹ *Conroy v. Oregon Co.*, 23 Fed. 71; *Lee v. Troy Co.*, 98 N. Y. 115.

² *Peterson v. Whitebreast Co.*, 11 M. R. 1; *Denver R. R. v. Conway*, 8 Colo. 1.

to show a want of concurring negligence on his part, is settled by the Supreme Court in *Railroad Company v. Gladmon*, 15 Wall. 401. The court there say: "The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law, the burden of proof on that point does not rest upon the plaintiff." Knowledge on the part of plaintiff that the platform was defective and unsafe is clearly a circumstance tending to convict him of concurring negligence, the proof of which, upon the authority cited, rests upon the defendant. It was therefore unnecessary to allege a want of knowledge on his part.

As to the want of an averment of knowledge on defendant's part, if such knowledge is a fact without proof of which the plaintiff can not establish the charge of negligence, then it should be averred. If, however, the defendant may be convicted of negligence, though ignorant of the defects in the platform, then the complaint is sufficient, and the question of defendant's knowledge, or want of it, is important as a matter of evidence only, in proof of the essential fact, which is the negligence.

That the latter proposition is the true one, appears both by the weight of authority and reason. In cases like the present, knowledge is regarded as an ingredient of negligence, which may be proved under an allegation of negligence. It was so held upon demurrer in *Byron v. Telegraph Co.*, 26 Barb. 39. If a master's personal knowledge of defects in his machinery is necessary to his liability, says Mr. Justice Byles, the more a master neglects his business and abandons it to others, the less will he be liable. * * * But knowledge is only an ingredient in negligence: *Clarke v. Holmes*, 7 H. & N. 937. Knowledge is only a fact in the case, to be considered by the jury with the other circumstances in determining on the one hand whether the defendant has been guilty of negligence, and on the other whether the plaintiff has been guilty of contributory negligence. But in neither case is such knowledge necessarily conclusive on the point: *Id.*, and *Williams v. Clough*, 3 H. & N. 258. To the same effect is the case of *Ford v. Rail-*

road Co., 10 Mass. 240. Speaking of knowledge on defendant's part, the court said: "The question was not whether the officers named knew or might have known of the defect or of the incompetency of those who had charge of repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use. Upon this point we think the demurrer is not well taken."

The second cause of demurrer alleged is, that the injury, if any, resulted from the negligence of plaintiff's fellow-servants. In the case of *Kielly* against the same defendant, this point was discussed at some length at this term, and the conclusion reached that the doctrine contended for by the defendant was not law. It was this: That the defendant, being a corporation, and unable to act otherwise than by means of servants, all persons employed by it in the same general business must necessarily be fellow-servants, within the rule exempting the master from liability for the negligence of one servant to another. It is unnecessary to discuss the point in this case, or do more than refer to what was said by the court in *Kielly's* case.

The demurrer overruled.

SMITH V. BELLOWS.

(77 Pennsylvania State, 441. Supreme Court, 1875.)

¹ **Amendment by changing form of action.** The plaintiff sued for the price of a share of oil stock which he had purchased of defendant, and declared in assumpsit for money had and received. At the trial he was nonsuited, but was afterward allowed to amend his declaration and declare in tort for deceit. *Held*, that the circumstances showing that by fraudulent imposition the defendant had obtained money, which he ought to return, either assumpsit or tort might be supported, and there was no error in allowing the amendment.

Amendment as affecting Statute of Limitation. The plaintiff was allowed to amend his declaration so as to change the form of action from assumpsit to tort. The cause of action accrued more than six years before the amendment, but not before the bringing of the suit. *Held*, that the cause of action remaining unchanged, the Statute of Limitation was not a bar; otherwise, had the cause of action been changed.

¹ *Ahrens v. Adler*, 12 M. R. 114.

Error to the District Court of Philadelphia

This was an action on the case, brought February 5, 1870, by William H. Bellows against Henry H. Smith. The plaintiff declared in assumpsit for money had and received, and in the other, common counts; the defendant pleaded "non-assumpsit."

The case came on for trial and a jury was called. After some progress had been made in the trial, a nonsuit was entered against the plaintiff. The nonsuit was taken off and the plaintiff was allowed to amend his declaration and declare in tort for deceit. This declaration was filed January 16, 1872, and set out:

That on the 2d day of January, A. D. 1865, Charles Buchanan owned a farm, consisting of about one hundred acres, in Mill Creek township, in Mercer county, and that Enoch Enochs, William H. Elliot, J. F. Bird and the defendant, contemplating the project of forming an oil company, upon the basis of the farm, to be called the Mill Creek Oil Company, had procured the refusal to purchase it; and to raise money to purchase it and to form the company, they concluded to raise \$50,000, by the sale of fifty shares in the company, at \$1,000 for each share; and for the purpose of inducing the plaintiff to purchase a share, the defendant, on the 7th of March of the year last aforesaid, intending to deceive, defraud and injure the plaintiff, falsely, fraudulently and deceitfully represented to him that the price to be paid for the farm was \$50,000, and if that sum could not be raised in the manner aforesaid, the company would not be formed, and the money paid by the plaintiff would be returned to him; that \$10,000 had already been paid for the working capital of the company, and that the defendant had paid for one of the shares, \$1,000. Whereupon the plaintiff, confiding in the representations of the defendant, and not knowing to the contrary, paid him \$1,000 for one of the shares; whereas the price to be paid for the farm was not \$50,000, but only \$15,000; nor was the sum of \$50,000 raised, but only the sum of \$30,000, no part of which was contributed by either the said Enoch Enochs, William H. Elliot, J. F. Bird, or the said defendant, nor had the defendant paid for one of such shares \$1,000; nor had \$10,000 been

paid for the working capital of said company. And the plaintiff having afterward discovered that the representations of the defendant were false and fraudulent, he demands of the defendant to return to him the sum of \$1,000 so paid by him, yet the defendant, knowing his representations were false and fraudulent, etc., and made to deceive and defraud the plaintiff, has not paid to him the said \$1,000, to plaintiff's damage, etc., \$2,000.

The defendant pleaded "not guilty," and two special pleas; one, that the cause of action did not accrue "at any time within six years before the plaintiff changed his cause of action," etc.; the other, that it did not accrue "at any time within six years next before the commencement of the suit grounded on the said supposed grievances, in manner and form as the plaintiff has complained against him."

The plaintiff demurred to the first special plea, because it "does not allege that the defendant was not guilty of said grievance within six years next before the said plaintiff brought his said action."

The court entered judgment for the plaintiff on the demurrer.

The case was tried February 17, 1873, before LYND, J.

The transactions on which the action was based, took place in 1865.

The verdict was for the plaintiff for \$1,000.

The defendant moved in arrest of judgment; the motion was dismissed, and judgment was entered on the verdict.

W. S. PRICE, for plaintiff in error.

R. P. WHITE (with whom was H. R. EDMUNDS), for defendant.

Chief Justice AGNEW delivered the opinion of the court, March 1, 1875.

A careful examination of this record discloses no error for which the judgment should be reversed. In the view of the case taken by the plaintiff in error, that the action lay against the company only, there would be force in some of the exceptions taken at the trial. But the evidence of the plaintiff be-

low presented a case of individual overreaching on part of the defendant, and it was so submitted to the jury, whose verdict establishes this view of the defendant's conduct. In that light we discover no error in the manner the case was treated. If the evidence were insufficient to support this view, or its weight fell upon the other side, the remedy of the defendant was in the court below.

We discover no error in the change of the form of action. The test is in the cause of action, not the Statute of Limitations. If the cause of action is the same declared upon, then the suit, *quoad* it, was brought in time. If the cause of action was not the same, then the action was not brought for it, and the Statute of Limitations would fairly apply. The fact that the first *narr.* was for money had and received (this being the material count), did not make the change from assumpsit to case in deceit, necessarily a change in the cause of action. The same circumstances of fraudulent imposition, showing that the defendant had obtained the money of the plaintiff, which *ex equo et bono*, he ought to return, would support either form of action.

Judgment affirmed.

MUNRO V. KING.

(3 Colorado, 238. Supreme Court, 1877.)

Duplicity in pleading is bad upon special demurrer.

¹ **Note payable on sale of mine.** A cotemporaneous agreement in writing executed by the payee of a promissory note, making the payment conditional upon the sale of certain mines, is admissible in evidence under the general issue in an action on the note by an indorsee after maturity, against the maker.

Failure or want of consideration must be specially pleaded in an action on a promissory note.

Appeal from Probate Court of Clear Creek County.

This was an action in assumpsit on a promissory note, by King, the defendant in error, as indorsee, against Munro, the

¹ *Anspach v. Bast*, 12 M. R. 110.

plaintiff in error, as maker. The declaration consisted of a special count in the usual form, and the money counts. The defendant pleaded the general issue, and a special plea of want of consideration. The plaintiff demurred to the special plea, the demurrer was sustained, and the defendant took leave to amend. Under the rule to amend, the defendant filed three special pleas; of these the second and third were stricken out on motion, and the plaintiff demurred to the fourth. Special causes of demurrer to this plea, and among them duplicity, were assigned, "in that the plea alleges that the payee did not convey the property therein mentioned, and then avers that he had no title to convey." The demurrer was sustained and the defendant elected to stand by his plea. The cause stood for trial on the general issue.

Upon trial had before the court, the plaintiff introduced in evidence a promissory note for \$700, dated January 10, 1874, payable to the order of Frank Fuqua, ninety days after date, without interest, and signed by Munro, the plaintiff in error.

Morsman, a witness for the defendant, testified that he saw the note, two weeks after it was given, and again on the 3d day of May, 1874, both times in the hands of Fuqua, the payee, and "at neither time were there indorsements in writing on the back of the note." Munro, the plaintiff in error, testified that he had given the note to Fuqua at the time of its date. He also proved the execution and delivery on the same date of an instrument of which the following is a copy:

"This agreement, made by and between Wm. Munro and Frank Fuqua, is to the effect that, whereas, Wm. Munro has this day made and delivered to Frank Fuqua his promissory note for the sum of \$700, for a certain interest in and to the Treasure Vault, Gilman, Glendale and Decatur lodes, all of which are located in Park county, except the Glendale lode, which is located in Summit county, Colorado Territory, and it is agreed and understood by the parties hereto that the said note is payable when the said lodes are sold and not until said lodes are sold.

GEORGETOWN, Jan'y 10, 1874.

FRANK FUQUA."

This agreement being offered in evidence by the defendant, was objected to as not being admissible under the pleadings; the objection was sustained and the defendant excepted. The

defendant then offered to prove want of consideration, and "that the note in question was executed and delivered by witness to Fuqua, payee, because of certain representations made by said Fuqua to him at the time the note was so executed and delivered, that he (Fuqua) held an interest with Dewey C. Dorn in certain lodes of silver-bearing mineral, and that he (Fuqua) assigned and released his pretended interest to said witness, and that said Fuqua pretended so to do, and at that time said Fuqua well knew that he had no interest in said lodes, and that each and every representation by him so made was false to his knowledge; and that said witness relied upon the truth of said statements when he made and executed said note."

The offer was objected to, the objection sustained and the defendant excepted. The plaintiff had judgment for \$700, and the defendant having duly reserved his exception thereto, prosecutes his appeal to this court.

Messrs. POST & COULTER, and Mr. W. S. ROCKWELL, for appellant.

Messrs. TAYLOR & YATES, for appellee.

WELLS, J.

1st. The fourth plea of the defendant is double, and the demurrer was properly sustained: *Merriwether v. Smith*, 2 Scam. 30.

2d. The written agreement of January 10, 1874, between Munro and Fuqua was erroneously excluded. It was affirmatively shown to have been executed contemporaneously with the note, which was the foundation of plaintiff's action. As between the original parties, therefore, the stipulations of this writing enter into and become a part of the terms of the promissory note: Byles on Bills, *98. Their effect is to prescribe a contingency, until the happening of which no action can be maintained.

The testimony of Morsman sufficiently evidences that the indorsement to plaintiff occurred subsequent to the day of maturity expressed in the note; plaintiff is therefore affected

by the collateral contract, and the action is subject to the same defenses as if payee were plaintiff. The action was prematurely brought, and this is available under the general issue: Gould's Pl., Ch. V, §§ 137-8.

3d. The evidence offered to show failure or want of consideration was properly excluded: *Patterson v. Gile*, 1 Colo. 200.

The judgment of the court below is reversed with costs.

Reversed.

BROWN V. ASHLEY.

(13 Nevada, 251. Supreme Court, 1878.)

Taxing costs in actions for diversion of water. In actions for the wrongful diversion of water, the Practice Act of Nevada fully authorizes the taxing of the costs against the party who is in the wrong, irrespective of the amount of damages recovered.

• Appeal from the District Court, Fourth Judicial District, Humboldt County.

This was an action brought by plaintiff against the defendant, for the alleged wrongful conversion of water. The complaint is in the usual form, and prays judgment for damages; a decree that plaintiff is entitled to the water; that defendant be enjoined from diverting it; for costs and for general relief. The defendant filed an answer denying the allegations of plaintiff's complaint, asserted ownership in himself, and asked for judgment for his costs. The jury found a general verdict in favor of the plaintiff, and assessed the damages at one hundred and fifty dollars.

Upon this verdict, judgment was rendered in favor of the plaintiff for the sum of one hundred and fifty dollars, and plaintiff decreed to be the owner of the land and water rights mentioned in the complaint; that he is entitled to have the water of the stream therein designated unobstructed, except that defendant might use such portion of said water as might be necessary for domestic purposes but not for irrigation,

and that plaintiff recover his costs, taxed at one hundred and ninety-two dollars and fifteen cents.

M. S. BONNIFIELD and WELLS & STEWART, for appellant, who was defendant below.

GRASS & HARDING, for respondent.

PER CURIAM.

Appellant claims that the only judgment authorized by the pleadings was a judgment for damages, and that the judgment being for less than three hundred dollars, the court erred in taxing the costs against appellant.

The pleadings in our opinion fully authorize the judgment as entered. In actions of this character, for the wrongful diversion of water, it is the usual and proper practice for the courts to tax the costs against the party who is in the wrong, irrespective of the amount of damages recovered, and such action is fully authorized by the provisions of the Practice Act of this State. The judgment of the district court is affirmed.

JACKSON V. McMURRAY.

(4 Colorado, 76. Supreme Court, 1878.)

Possession as a question of fact. The evidence of plaintiff in ejectment for claims 16 and 17 west, on the Gregory lode, tended to show possession in, and occupation by himself and his grantors, from 1860, until forcibly dispossessed in 1865. The evidence also tended to show possession in defendant's grantors as early as 1860, leaving the question of priority of possession, however, involved in doubt. Two juries had found successive verdicts for plaintiff: *Held*, that the judgment would not be disturbed, the verdict not appearing to be clearly unsupported.

Certificate of entry at U. S. land office as evidence. To admit in evidence the certificate of the register of the United States land office showing a mining claim in controversy to have been entered for patent, it is necessary to first prove the signature of the register.

Appeal from the District Court of Gilpin County.

The case is stated in the opinion.

L. C. ROCKWELL, for appellant.

H. M. & W. TELLER, for appellee.

ELBERT, J.

This was an action of ejectment, brought by the appellee to recover the possession of mining claims Nos. 16 and 17 west, on the Gregory lode.

A trial was had at the May term, 1875, resulting in a verdict for the plaintiff.

The evidence on behalf of the plaintiff below showed, more or less conclusively, the actual possession and occupancy of these claims by James Graham, from 1860 to 1864; afterward the possession and occupancy of Thomas Graham, one of his heirs, until he was forcibly ejected from the property, in 1865. Joseph Graham appears to have occupied the property from 1860 until some time in 1861, in connection with his brother James.

With this title, by occupancy and possession, the plaintiff below connected himself, by conveyance from the heirs of James and Joseph Graham.

The evidence on the part of the defendant tended to show possession of the premises on the part of the defendant's grantors, as early as 1860.

The evidence is conflicting as to which was the prior possession.

This issue has been twice found in favor of the plaintiff, by a jury; and their verdict should not be disturbed, unless it is clearly unsupported by the evidence. That such is the case there can be no claim.

We need not inquire whether the deeds, admitted in evidence on behalf of the appellee, to show paper title in the Grahams, were properly admitted or not, as, independent of these deeds, there was sufficient to warrant a finding in favor of the plaintiff.

The offer of the defendant to show, by the certificate of the register of the United States land office, that the property in dispute had been entered by the Consolidated Bobtail Gold Mining Company, since the commencement of the suit, was properly rejected. There was no proof of the signature of the register, and this was necessary to entitle the certificate to admission: *Fail v. Goodtitle*, 1 Ill. 201.

Had proof of signature been made, the question of its admissibility, except under a plea of *puis darrein continuance*, would still have remained to be determined.

We find no valid objection to the instructions of the court. They were as favorable to the defendant as he was entitled to ask.

The judgment of the court below is

Affirmed.

FORT SCOTT COAL AND MINING CO. V. SWEENEY.

(15 Kansas, 244. Supreme Court, 1875.)

¹**Consideration in prospecting lease—Warranty.** Under a prospecting lease wherein the lessee agrees to pay a royalty or a fixed sum to be allowed as advance royalty, there is no implied warranty that the coal sought for when found shall be "good, marketable, merchantable coal." The consideration will be applied as for the use of the land.

Answer can not vary legal effect of contract. Allegations in an answer, so far as they attempt to vary or contradict the terms or import of an admitted written contract between the parties set forth in the petition, are mere nullities; and it is not error for the court to exclude evidence offered in support of them.

²**Verdict for plaintiff, when may be directed.** Where neither the answer nor the evidence offered in support thereof, nor both together, amount to a defense, it is no error for the court to instruct the jury to find for the plaintiff.

Error from Bourbon District Court.

Sweeney recovered judgment, at the December term, 1873, of the district court, C. O. F., Judge *pro tem.*, presiding.

¹ *Harlan v. Lehigh Co.*, 8 M. R. 496.

² *Murphy v. Cobb*, 5 M. R. 330.

The defendant, the Coal and Mining Company, brings the case here for review. The opinion contains a full statement of the pleadings and facts.

McCOMAS & McKEIGHAN, for plaintiff in error.

HARRIS & SPENCER, for defendant in error.

The opinion of the court was delivered by VALENTINE, J.

On December 12, 1872, the Fort Scott Coal and Mining Company entered into a written contract with John Sweeney, whereby Sweeney leased unto said company, their successors and assigns, "for the full term of two years (with privilege of continuing said lease at its expiration), the sole and exclusive right and privilege of boring, digging, and otherwise prospecting for coal, petroleum, lead, or other valuable substance on the following described tract of land, to wit: the S. E. $\frac{1}{4}$, Sec. 34, T. 26, R. 25, in Bourbon county, and of taking out, and of working the same, together with the right of way and surface use of such land as may be necessary for the economical and efficient working of the same." The only consideration moving from the Mining Company to Sweeney for this lease, as the same is expressed in the written contract, is as follows: One dollar paid down, one cent royalty on each bushel of coal taken from the leased premises, except that "all coal from the shafts, entries, turn-outs, air-courses and coal used at the works, is to be free from rental or royalty." "The Fort Scott Coal and Mining Company also agree to pay to said John Sweeney royalty to the amount of \$500 on or before the first day of May, 1873—said money to be considered as royalty in advance, if said company have not at that time taken out 50,000 bushels of coal." Said \$500 was not paid when it became due, and on May 8, 1873, Sweeney commenced this action against said company to recover the same. The defendant answered, alleging as a defense to the plaintiff's cause of action, "that the consideration moving the defendant to take and enter into said lease and agreement was, that the defendant might have the right to go upon the land therein described, and dig and remove therefrom good, merchantable and marketable

coal, which it was *believed* and *understood* at said time, by the plaintiff and defendant, was to be found therein. Defendant says that there was not, nor is there, any good, marketable or merchantable coal upon or in said premises, nor was there nor is there any coal upon or in said premises as was supposed at the time of making said lease and agreement; and that Sweeney *agreed* and *promised*, at the time of making the lease, that the coal to be found and taken from the leased premises was good and merchantable coal." The case was tried before the court and a jury. The defendant offered to introduce evidence showing that the coal taken from said premises was not good, merchantable, marketable coal, and that the defendant did not know, at the time when the defendant entered into said written contract, that said coal was not good, merchantable coal. The court excluded the evidence, and afterward instructed the jury to find for the plaintiff, which the jury did; and judgment was rendered for the plaintiff and against the defendant for said \$500, and interest and costs. The defendant now, as plaintiff in error, seeks to reverse that judgment.

There is no claim that there was no coal on or in said land. It would seem from the evidence offered and introduced, that there was plenty of it. There may have been millions of bushels. Indeed, from anything appearing in the record the defendant may have taken from said land hundreds of thousands of bushels of coal before this suit was commenced. Neither is there anything in the record showing how much "petroleum, lead or other valuable substance," said land contained. The only claim of the defendant as a defense, is, that the coal found in said land is not "good, marketable, merchantable coal."

Now, suppose it is not; may not the plaintiff still recover? The plaintiff did not agree or promise that it should be good, marketable, merchantable coal. He did not make any warranty of any kind whatever; and no fraud is imputed. Besides, there is no failure of consideration, as is claimed by the defendant. The lease of the land, with all its incidents, in the aggregate, was the consideration for the defendant's promises. And this consideration seems to be entire, and not divisible. At least this would seem to be so where both the cause of action and the defense are purely of a legal character as contradistin-

guished from an equitable character. With the lease the defendant gets more than the mere right to take good, merchantable coal from the plaintiff's premises. The defendant actually gets "the sole and exclusive right and privilege of boring, digging, and otherwise prospecting for coal, petroleum, lead or other valuable substance on" said premises, with the right "of taking out and of working the same," that is, of taking out and working the coal, petroleum, lead, etc., whether the same be marketable or not, "together with the right of way and surface use of such land as may be necessary for the economical and efficient working of the same," and the *free* use of much of the coal taken out; and all this the defendant gets for at least two years, and longer if the defendant chooses. Now, if the plaintiff is to get pay only for the good, merchantable coal taken from his premises, where will he get pay for the exclusive right of boring, digging and prospecting on his land for two or more years for coal, petroleum, lead, etc., and for the coal not merchantable, and for the petroleum, lead, etc., taken from the land? And where will he get pay for the right of way and surface use of his land, etc.? It is evident from the contract that it was the intention of the parties that this \$500 should be paid by the defendant to the plaintiff, whatever might be the result of the boring and digging for coal, petroleum, lead, etc. Both the terms of the contract and reason of the transaction show this to be true.

It will be noticed that the defendant does not ask to have the contract canceled. The defendant does not choose to relinquish any right which it has obtained by virtue of the contract. It still clings to the right to bore and dig on the plaintiff's land for the full two years, or longer. Indeed the defendant does not wish to dispense with any portion of the contract, except that portion which imposes duties and obligations upon itself, and confers benefits on the plaintiff. But a contract can not be considered good as to one party and bad as to the other, and as the defendant does not even ask to have the contract canceled or rescinded, it must be enforced as to both parties; and there can be no question that by its terms the plaintiff is entitled to recover.

So far as the answer of defendant attempts to vary or modify the terms of the written contract, or to allege that the

contract was different from what the written contract itself shows it to be, the answer itself is a nullity. And this is about all the answer contains. The answer in fact states no defense, and the evidence offered and introduced by the defendant was even more defective than the answer. The purport of both was to vary and contradict the terms and import of the written contract entered into between the parties. Taking both together, they did not make out any sufficient defense to the plaintiff's action. The court, therefore, did not err in excluding said evidence, and in instructing the jury to find for the plaintiff.

The judgment of the court below is affirmed.

All the Justices concur.

GLIDDEN ET AL. V. NORVELL.

(44 Michigan, 202. Supreme Court, 1880.)

¹ **Special demurrer to bill good in substance.** Defects in form in a bill in equity, can not be reached by a general demurrer. The bill, though objectionable in form, must be sustained, if it show a case for equitable relief.

Injunction against mixing and removing ores held as security. When a bill averred that a large lot of iron ore, classed as No. 1 in quality, had been set aside to complainant to secure an indebtedness, and that an assignee of the debtor had taken possession, was mixing it with inferior ore, and shipping it beyond the reach of complainant: *held*, a case for injunctive relief, although sundry of the averments were so defectively made that a special demurrer might have been sustained to them.

Idem—Destroying security not permitted although defendants be solvent. In such a case, where the relief to which complainant is entitled, could not be granted by a court of law, and securities would be destroyed, an injunction should be granted even if all the defendants were solvent.

The failure to verify an injunction bill is of no importance except on the motion for injunction and a verification can be allowed when such motion is made.

Appeal from Baraga. Submitted June 17th. Decided June 23d.

¹ *Schilling v. Rominger*, 4 Colo. 100.

Bill to enforce a lien on ore, and to enjoin defendant from mingling other ores with that on which the lien was placed, and from selling it. Dismissed on demurrer. Complainants' appeal. Reversed.

F. O. CLARK, for complainants.

JOHN Q. ADAMS and G. W. HAYDEN, for defendant.

COOLEY, J.

In the court of chancery a general demurrer to the bill of complaint in this cause was sustained, and the bill dismissed. Whether equities are shown by the bill, is therefore the only question here.

The complainants are partners in business at Cleveland, Ohio, under the firm name of Glidden & Eells. The bill alleges that during the year 1877 they made large advances to the Spur Mountain Iron Mining Company, a corporation doing business in the county of Baraga, and said company was on the 19th day of December, 1877, indebted to complainants in "the sum of \$24,000, as near as may be; that for the purpose of further securing said indebtedness to your orators, said Spur Mountain Iron Mining Company, through its general manager, Freeman Norvell, gave a bill of sale or lien upon fifteen hundred tons of iron ore of standard quality, meaning by that number one ore—the product of the mine of said Spur Mountain Iron Mining Company; said ore being in stock pile at said mine in Baraga county, Michigan; and upon said 19th day of December, said Spur Mountain Iron Mining Company gave to your orators an instrument in writing, as evidence of their lien upon said ore, said writing being as follows:

"DETROIT, Mich., Dec. 19, 1877.

"This certifies that we now hold in stock pile at Spur mine, Lake Superior, Mich., subject to the order of Glidden & Eells, fifteen hundred gross tons of iron ore of standard quality, the product of the mine of this company known as the Spur mine, delivery to be made on the order of Glidden & Eells indorsed thereon and the return of this receipt.

"F. NORVELL, General Manager."

"That together with said certificate of lien above, was received a letter from said Freeman Norvell, as follows:

"SPUR MOUNTAIN IRON MINING COMPANY,
"General Manager's office, 92 Griswold Street, Detroit. }
"Dec. 20 1877. }

"GLIDDEN & EELLS, Cleveland, Ohio.

"Gents: Inclosed find certificate of fifteen hundred tons of ore in stock pile at the mine, sent by you to me to sign, to add to the security you hold for advances made to us this season, said ore to be subject to your order to the extent of your lien.

"Very truly yours,

"F. NORVELL, General Manager."

"That said Spur Mountain Iron Company became insolvent, and upon the twenty-first day of February, 1878, made a general assignment to Freeman Norvell for the benefit of creditors.

"That soon after the making of said assignment, said Freeman Norvell, acting as assignee under said assignment, took possession of all the property of said mining company at the mine in said Baraga county, together with the ore held by your orators as above stated, and continued to hold the same undisturbed until on or about the 12th day of May, 1879, when, as your orators are informed and believe, said Freeman Norvell, who resides at Detroit, Michigan, directed James Wilson, who was left in charge of all of said property at said mine, as the agent of said Freeman Norvell, assignee, to mix the standard number one ore, which had so been turned over to your orator as security, with number two ore, and to ship the said ore so mixed as inferior quality, and for the purpose of defrauding your orators and depriving them of their security."

The bill further alleges that said Wilson has proceeded to execute such directions of said Norvell; that the whole amount of the ore so turned out to complainants except about six hundred tons, has been already shipped from the mine; that a large amount of it is now in the hands of the Marquette, Houghton & Ontonagon Railroad Company; that if the same is delivered to said Norvell by said railroad company, complainants will be defrauded of their security as they believe,

and that said Spur Mountain Iron Mining Company is bankrupt, and will pay little or nothing to its creditors as complainants believe.

The bill prays that Norvell be enjoined from mixing any more of the ores with others of an inferior quality, and from shipping any of the same without complainants' assent, and from removing any of them from the possession of the railroad company; and that an account may be taken of the amount due to complainants, and the ores sold to satisfy the same, etc.

As all that is material in the bill is above given, it will readily be perceived that it is, as a pleading, exceedingly imperfect, indefinite and uncertain; and it is not surprising that it was made the subject of a demurrer. It gives no account of the indebtedness of the mining company to complainants except as it states the amount, how it is evidenced, the time or times when it came due or will come due. It assumes that other securities exist, but it does not state what they are, or their amount or value, and it does not even allege that anything is now owing to them, except indirectly, as it asserts the danger of their being defrauded. No doubt a special demurrer pointing out these and some other defects must have been sustained; but the question now is whether a general demurrer will reach them. A general demurrer challenges the equity of the case made by the bill, and must be overruled if a case for equitable relief is set out, however imperfectly: *Clark v. Davis*, Har. Ch. 227; *Hoffman v. Ross*, 25 Mich. 175.

The specific objections pointed out on the hearing are:

1. That the bill does not show an indebtedness to any specified amount at the time the bill is filed, and therefore does not show equitable jurisdiction; it does not show that previous securities have failed to satisfy the debt, or that the pretended security set out in the bill is still unsettled or in existence. So far as the bill is uncertain in these particulars it is susceptible of amendment. No doubt the bill should have shown an interest to an amount sufficient to give the court jurisdiction; but on general demurrer we will not assume that a debt, to secure which the debtor turned out fifteen hundred tons of number one iron ore, was not over one hundred dollars.

2. That Norvell's authority to turn out the ore to com-

plainants does not appear; that the instrument turning it out does not purport to give a lien; that as a chattel mortgage it would be void for uncertainty in description, and for want of filing or of a change of possession of the property. But the allegation that the company, by Norvell, its general agent, executed the paper, is a sufficient allegation of his authority: *University v. Detroit Society*, 12 Mich. 138; and the paper writing does not purport to be a chattel mortgage, but a setting aside of certain property for complainant, to be subject to their order. The fact that it was thus set aside as security appeared by the contemporaneous letter. When any one questions its good faith, it will be time to inquire into it. There is no defect in the description of property, and nothing on the face of the papers indicates that there would be or could be difficulty in identification.

3. That complainants have an adequate remedy at law. There is no merit in this objection. A court of law could not enjoin the mixing of ores or the transportation of the property beyond its jurisdiction. Even if all the parties were responsible, complainants could not be required to stand helplessly by while the property turned out to them is carried off, and trust to the chances of receiving its value.

4. That the bill is not verified. In fact it appears to have been sworn to in another State, and the official character of the person administering the oath is not shown. But a verification is only important for the purpose of a motion for an injunction, and any defect in the showing on oath may be remedied when that motion is made.

The decree dismissing the bill must be reversed and the cause remanded for further proceedings.

The other Justices concurred.

1. Several inconsistent defenses may, under proper circumstances, be set up in a verified answer: *Bell v. Brown*, 5 M. R. 240; *People v. Lothrop*, 3 Colo. 428.

2. Plea of Statute of Limitations and of liability never incurred for rent under coal lease, are inconsistent pleas: *Emmott v. Mitchell*, 14 Sim. 432.

3. Fraud, how pleaded. It is not error to reject a special plea setting up matter in defense to the action, when the plea of non-assumpsit is filed: *Iale v. West Va. Co.*, 11 W. Va. 229.

4. In a suit for rescission on the ground of fraud, the particular circumstances which constitute the alleged fraud must be set forth: *Arnold v. Baker*, 7 M. R. 111.

5. Joinder of actions for distinct and independent injuries to property: *More v. Massini*, 7 M. R. 455.

6. Trespass, and not case, lies for encroaching on a lead mine: *Harker v. Birkbeck*, 3 Burr. 1556; 1 Wm. Bl. 481. Case, and not trespass, is the action against mine owner failing to leave sufficient support to the surface: *Harris v. Ryding*, 5 M. & W. 60; *Jeffries v. Williams*, 14 M. R. —.

7. Trespass *vi et armis* and trespass on the case, can not be joined in the same action: *Haward v. Bankes*, 2 Burr. 1118.

8. A plaintiff can not join in the same complaint a count in contract against one of two defendants with a count on the fraud of both: *N. C. Land Co. v. Beatty*, 69 N. C. 829.

9. For a sufficient complaint in an action for damages caused by breaking of ditch, see *Toulumne Co. v. Columbia Co.*, 10 M. R. 634; for breaking dam, see *Hoffman v. Tuolumne Co.*, 10 Cal. 413; for insufficient complaint for injuries caused by open quarry, see *Hounsell v. Smyth*, 7 C. B. N. S. 731.

10. Ambiguous plea, how construed: *Emma S. M. Co. v. Emma S. M. Co.*, 7 Fed. 401; *State v. Lady Bryan M. Co.*, 3 M. R. 526.

11. Where the property (oil royalty) in dispute between two parties claiming ownership is in the hands of an officer, such officer is a proper party upon a bill of interpleader, in order to render the decree effective: *Oil Run Co. v. Gale*, 6 W. Va. 525.

12. An action in ejectment and for relief in equity, should not be dismissed, because the court has no jurisdiction to grant the relief in equity; the plaintiff may nevertheless recover in ejectment: *McNeady v. Hyde*, 47 Cal. 481.

13. The proper remedy between tenants in common for the price of ore paid by one to the other through mistake, is account render, and not assumpsit: *Irvine v. Hanlin*, 14 M. R. —.

14. Action for specific performance, and not ejectment, is the proper remedy for breach of a written agreement to convey a mining claim, and to let grantee into possession: *Felger v. Coward*, 5 M. R. 273.

15. To maintain an action against several parties for a tort, it is essential that the wrong complained of be joint: *Keyes v. Little York Co.*, 14 M. R. —.

16. If a defendant demurs and subsequently answers, and the record is silent as to the disposition of the demurrer, it will be presumed that it was abandoned: *Basey v. Gallagher*, 1 M. R. 683.

17. The finding that a location notice was sufficient and the boundaries properly staked, is a finding of facts: *Eilers v. Boatman*, 111 U. S. 356.

18. Practice on motion for injunction, under Montana Code: *Fabian v. Collins*, 2 Mont. 510; *Ervin v. Collier*, Id. 605; *Fabian v. Collins*, (3 Mont. 215) 5 M. R. 20.

19. Suit maintained by part of shareholders to have their deposits repaid, without making all the shareholders parties: *Blain v. Agar*, 6 M. R. 388, 393.

20. For the remedy on breach of an injunction, see *Eldridge v. Wright*, 7 M. R. 418.

21. On motion to dissolve injunction on complaint and answer, the denials of the answer are taken as true: *Magnet Co. v. Page Co.* 7 M. R. 540.

22. Where a motion to dissolve an injunction is heard upon the pleadings alone, it should be granted if the answer denies all the material allegations of the complaint: *Johnson v. Wide West M. Co.*, 22 Cal. 479; *Lady Bryan Co. v. Lady Bryan Co.*, 7 M. R. 478.

23. Counter claim in suit between company and agent concerning conversion of ore: *Gentry v. Grand View M. & S. Co.*, 13 Fed. 544.

24. The jurisdiction of a court of equity to restrain the destruction of the estate by mining, where a defendant is in adverse possession under claim of title, considered: *Haigh v. Jaggard*, 2 Coll. 231; S. C. on law side, 16 M. & W. 524.

25. An averment will be taken as confessed, if denied in such manner that no issue is raised: *Fellows v. Webb*, 43 Iowa, 133.

26. A denial that defendants "wrongfully and illegally" diverted certain water, is an admission of the act of diversion: *Harris v. Shontz*, 1 Mont. 212.

27. An averment in the answer that the defendant did not commit the act charged, is a sufficient traverse of the matter alleged: *Hill v. Smith*, 4 M. R. 597.

28. A denial in the language of the complaint "that labor was performed at the request of defendant," not a denial of complaint: *Bradbury v. Cronise*, 9 M. R. 366.

29. No decree can be made, if the allegations in an amended bill are contrary to those of the original bill: *Milton v. Hogue*, 4 Ired. Eq. 415.

30. Amendments may be made on appeal, which do not change the issues tried in the lower court: *Monroe v. Northern Pac. Co.*, 2 M. R. 652.

31. The filing of the original complaint does not stop the Statute of Limitations from running against a trespass upon a parcel of land omitted in the description; it ceases to run only upon the filing of the amended complaint: *Atkinson v. Amador Canal Co.*, 12 M. R. —.

32. No error to refuse to allow defendant to amend answer after a return of the findings upon the point on which it was sought to amend: *Sears v. Collins*, 13 M. R. —.

33. Where the gravamen of an action is breach of contract, allegations of fraud do not change the nature of the action, and can not be tried therein: *Graves v. Waite*, 59 N. Y. 156.

34. A pleader averring a written sale of a mining claim may prove a verbal one: *Patterson v. Keystone Co.*, 13 M. R. —.

35. In a suit upon a written instrument, where there is a variance between the copy filed and the allegations of the complaint, the copy will control: *Watson Co. v. Casteel*, 9 M. R. 130.

36. Defective description of premises in complaint cured by correct description in the verdict; judgment ordered to follow the description in the verdict: *Frohner v. Rodgers*, 2 Mont. 179.

37. Defendant pleaded false representations as to mineral character of lands, as showing want of consideration. Plea held defective in not giving sufficient description of the lands, State and county only being mentioned: *Wann v. McGoon*, 2 Scam. 74.

38. Title to premises in dispute accruing after commencement of action, should be set up by a supplemental answer: *Kahn v. Old Telegraph M. Co.*, 7 M. R. 559.

39. Affidavit of excusable neglect or inadvertence, and also of merits, necessary to set aside default where service has been regular: *Lamb v. Gaston Co.*, 1 M. R. 381.

40. The San Francisco Sulphur Mining Co. made default after being served with process as the San Francisco Sulphur Co. *Held*, that the default would not be set aside because of the technical mistake: *Jones v. San Francisco Co.*, 14 Nev. 172.

41. To justify the construction of a ditch on the land of another under a parol license, the license must be pleaded: *Alford v. Barnum*, 10 M. R. 422.

42. Forfeiture must be specially pleaded: *Morenhaut v. Wilson*, 1 M. R. 53; *Contra, Steel v. Gold Co.*, 18 Nev. 80.

43. Forfeiture of charter by corporation, how inquired into, and organization of corporation, how proved: *Crumpp v. U. S. M. Co.*, 3 M. R. 454.

44. Essential allegations in a petition for the removal of a cause from State to Federal court: *Little York Gold Co. v. Keyes*, 96 U. S. 199.

45. A judgment is none the less final because some future orders of the court may become necessary to carry it into effect: *Perkins v. Sierra Nevada Co.*, 10 Nev. 405.

46. To maintain a suit by several stockholders against the trustees of a corporation it is sufficient to prove that one of the plaintiffs is a stockholder: *Parrott v. Byers*, 13 M. R. —.

47. Costs of witnesses summoned, but not examined: *Paddock v. Forrester*, 4 Man. & Gr. 775.

48. Costs allowed sheriff for keeping attached mining machinery: *City Bank v. Tucker*, 7 Colo. 220.

49. Apportionment of costs in equity: *Union M. Co. v. Dangberg*, 8 M. R. 113; *Coffman v. Robbins*, Id. 131.

50. Eccentricities of Code Pleading; the *waiver of a waiver*: *Iowa M. Co. v. Bonanza Co.*, 16 Nev. 64; verbiage and surplusage to excess do not make a complaint demurrable: *Campbell v. Taylor*, 3 Pac. 445.

51. Where the answer in ejectment set up affirmative title which was not replied to, but the parties went to trial on the merits, and defendant asked a nonsuit upon the ground of insufficient evidence, he can not, after verdict, take advantage of the want of reply: *Quimby v. Boyd*, 6 Pac. 462.

52. Where a plaintiff in rebuttal for the first time attacked defendant's location stake, *held*, that defendants were entitled to support it by calling witnesses after the rebuttal: *Chamberlain v. Raymond*, 1 Pac. 850.

HARRIS ET AL. V. EQUATOR MINING & SMELTING CO.

(3 McCrary, 14; 8 Federal R. 863. U. S. Circuit Court, District of Colorado, 1881.)

Location presumed where possession held during period of statute.

When a purchaser of a lode claim has, under color of title, been in possession during the period of the Statute of Limitations, he is not required to make proof of a valid location; his location will be presumed to have been regularly made, and will defeat an adverse location made during such possession.

Distinction in favor of purchaser. The purchaser of mining ground may occupy a position different from the locator. As against the government, only strict compliance with the law regulating location, will avail, but the purchaser has a better right as against other citizens seeking to locate the same ground.**¹ Mining claims are treated as real estate** although the title be held under conditions, and as such are conveyed by deed, are sold on execution, and descend to the heir.**² Possession extends to bounds claimed in title papers.** A deed not giving boundaries, but reciting a location certificate in which a full and definite description is contained, will extend the possession to the entire claim described in such location certificate.

The action was ejectment brought by Lona M. Harris et al., claimants of the Ocean Wave lode, in support of an adverse claim, filed against the application of the defendant for patent on the Charlotte lode. The property was situate on Leavenworth mountain, in Griffith mining district, Clear Creek county, Colorado.

Plaintiffs and their grantors, or those through whom they attempted to trace title, had been in possession since 1867, and had driven an adit on the vein several hundred feet at the time of the location of the Charlotte lode.

On the trial at May term, 1881, a verdict was rendered for plaintiffs for the entire conflicting area, and the following opinion was rendered after argument, upon defendant's motion for new trial.

HUGH BUTLER and R. S. MORRISON, for plaintiffs.

HENRY M. TELLER, WILLARD TELLER and E. O. WOLCOTT, for defendant.

¹ *Atkinson v. Tabor*, 7 Colo. 195.

² *North Noonday Co. v. Orient Co.*, 9 M. R. 531.

HALLETT, J.

Defendant applied in the land office at Central City, to enter the Charlotte lode, and plaintiffs made adverse claim to a part of the territory as the Ocean Wave, and brought this suit in support of their claim. The claims overlap near the ends, and the area in dispute is not very large. The Ocean Wave is something more than ten years older than the other location, and a tunnel has been run nearly the whole length of the claim. At the trial there was evidence to show that the lode was discovered in the year 1867, and that work had been done in the tunnel from time to time thereafter, until this suit was brought. Very little ore was taken from the tunnel, but several witnesses testified that the lode was well defined and clearly traceable throughout the length of the tunnel. An attempt was made to show a valid location, according to the law in force in 1867, and plaintiffs also relied on a re-location in 1875. In this plaintiffs were not successful, and they were at last forced to rely on possession only in themselves and their grantors as evidence of title. As to the matter of possession, it was shown that the tunnel was worked from time to time and by different parties from the date of discovery in 1867 until this suit was brought. Some of the parties in possession, and others who were not in possession, had conveyed parts of the claim, or an interest therein, to other parties named; but, as plaintiffs were unable to connect themselves with these conveyances, they were not received. One conveyance made by a master in chancery, under a decree of court, in Clear Creek county, was, however, received under the circumstances which will now be stated.

In the year 1875, and for some time prior thereto, the Leavenworth Mountain Mining and Tunneling Company was in possession of the property, and had done some work in the tunnel. They had erected buildings at the mouth of the tunnel, and appeared to have and hold undisputed possession, but whether under claim of title was not shown. In this situation of affairs, one James M. Estelle brought suit against that company in the District Court of Clear Creek County, and in June, 1876, obtained a decree for the sale of the premises, to satisfy several amounts of money in the decree men-

tioned. The premises were sold under the decree to Estelle and Morrison, and in due time a deed was made to Estelle, Morrison having assigned to him his interest in the purchase.

Several plaintiffs claim by descent, and others by purchase, from Estelle; and there was evidence at the trial tending to prove that they, or persons in their interest, were in possession of the Ocean Wave at the time the Charlotte lode was located in October, 1879. Upon these facts a question was presented at the trial, whether the plaintiffs, not having shown a valid location of the Ocean Wave, could claim anything in virtue of their possession of the ground in controversy, if the jury should find that they held possession at the date of the Charlotte location; and it was conceded that as to the tunnel itself, and the area covered by the buildings of the plaintiffs at and near the mouth of the tunnel, their right could not be denied. But it was contended that nothing less than a valid location could give to them a possession beyond their actual occupancy to the full extent of a claim 1,500 feet in length by 150 feet in width. Upon a familiar principle, it was said, a locator of a mining claim on the public lands is required to conform to the statute and the local rules of the mining district in which his claim may be situated, in order to establish his right to a full claim, and that a grantee of the locator should be held to the same proof. This, however, embraces something more than the principle that the title to and the right to occupy the public mineral lands can only be acquired in the manner prescribed by law. Conceding that proposition, it does not follow that a locator in actual occupancy, who has been evicted by a wrong-doer, must give evidence of every fact necessary to a valid location in an action to recover possession. Not on the ground that the essentials of a valid location are in any case to be omitted, but that, in support of undisturbed possession, long enjoyed, a presumption may in some cases arise that the location was at first well made. The Statute of Limitation, enacted by the State, and recognized in the act of Congress, is founded on this principle. If, in this State, the practice in ejectment for mining claims has been to show all the steps of a valid location in cases of actual occupancy and possession in the plaintiffs, it has never been declared that such proof is in all such cases indispensable.

It is not necessary, however, to discuss the point at length, for it is clear that a purchaser may be in a different position from the locator of the claim, not as against the general government, with which nothing can avail but strict compliance with the law regulating location, but as against other citizens seeking to locate the same ground; it may well be said that a purchaser in possession under a conveyance regular in form is in by color of title, which in time, under the Statute of Limitation, will ripen into a perfect right. And it seems reasonable to allow him to maintain his possession and his right against one who seeks only to initiate a new claim to the same thing. In doing so, the regulations respecting locations are not at all relaxed, nor is any condition on which the estate is held set aside. A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions, on failure of which it will be defeated, is not controlling. In general, we apply to mines in the public lands the rules applicable to real property, as that it may be conveyed by deed, is subject to sale on execution as land, descends to the heir of the claimant and not the personal representative of his estate, and so on. No reason is perceived for denying the force and effect of the rule under consideration as applicable to such property. This view is accepted in California, and I have not found any authority against it: *Attwood v. Fricot*, 17 Cal. 38; *Hess v. Winder*, 30 Cal. 349.

The deed from the master in chancery to Estelle does not give the boundaries of the claim, without which, according to the authorities cited, it would have no effect to extend the possession of plaintiffs beyond the parts actually occupied by them. But reference is made to a location certificate of record which contains a full and definite description of the claim, which is the same as if the description had been given in the deed. It matters not that the location certificate was not shown to be regular in all respects. If it gives a correct description of the property, such description is, by reference, incorporated in the deed.

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The charge to the jury, of which defendant complains, was,

in substance, that possession of the Ocean Wave by plaintiffs, at the date of the Charlotte location, should extend to the limits defined in the master's deed to Estelle, and would defeat an adverse location during such possession. This, of course, was subject to proof of a lode in the Ocean Wave ground, of which there was evidence. The proposition, as stated, is believed to be correct, and the motion for new trial will be denied.

Judgment for plaintiffs.

WILD ET AL. V. HOLT.

(9 Meeson & Welsby, 672; 1 Dowling N. S. 876. Court of Exchequer, 1842.)

¹Possession proved by admissions. In trespass for breaking and entering the plaintiffs' mine and taking coals, evidence of working by the plaintiffs in another part of the same mine within eighty yards of the place of the alleged trespass, coupled with a statement by the defendant that he had got the coal and was willing to pay such amount as should be settled by arbitration; *held*, evidence of the plaintiffs' being in possession of the place where the trespass was committed.

Measure of damages in trespass—Royalty not deducted. In trespass for taking coals where the trespasser is a mere wrong-doer, the measure of damages is the value of the coals at the time when they first existed as chattels, and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine owner on coals got from the mine.

Trespass for breaking and entering a mine in the possession of the plaintiffs and one Edward Stelfox, in the lifetime of Stelfox, and taking coals therefrom. Pleas: first, not guilty; secondly, that the plaintiffs were not possessed of the mine in the declaration mentioned; on which issues were joined. At the trial before Rolfe, B., at the last Liverpool assizes, the plaintiffs claimed to be possessed, as the surviving assignees, of certain leases of the mine in question, granted by Lord Suffield, but failed to derive a title under those leases. The plaintiffs then proved that at the time of the alleged trespass they were working the coals within about eighty yards of the spot where the trespass was committed; and that the defendant had admitted

¹ *Green v. Ophir Co.*, 12 M. R. 140.

that he had got the coal, and had expressed his willingness to pay such amount as should be settled by arbitration. It was proved that the expense of getting each quarter of coals amounted to 4s. 6d., which included a payment to Lord Suffield of 2s. 6d., under the name of quarterage. The value of the coals taken by the defendant was estimated at £748, being calculated at £1 per quarter. For the defendant, it was contended that there was no sufficient evidence of the joint possession of the mine by the plaintiffs, and that they ought therefore to be nonsuited, or, at all events, that the defendant was entitled to deduct the 4s. 6d. per quarter, the expense of getting the coals. The learned judge thought there was evidence to go to the jury of the plaintiffs' possession, and directed them, if they were satisfied of that fact, to return a verdict for £478. The jury thereupon found for the plaintiffs for that sum, and the learned judge reserved leave to the defendant to move to enter a nonsuit, or to reduce the damages to 1s., or to reduce them by deducting the 4s. 6d. per quarter.

KNOWLES now moved accordingly.

PARKER, B.

I think that, coupling the evidence of the plaintiffs' working in different parts of the mine with the defendant's admissions, there clearly was evidence for the jury of the plaintiffs being in possession of the whole mine. Then, as to the damages, the jury are at liberty to give the full value of the coals, calculated at the time when they first existed as chattels, without deducting the expense of getting them, according to the rule laid down in the case of *Martin v. Porter*, which is a very salutary one, because the parties must know—at least they may know by proper dialing—that they are trespassing on their neighbor's property. And the defendant is not entitled to any deduction in respect of the rent payable to Lord Suffield because he will be entitled to quarterage on the coals when their value has been recovered by the plaintiffs.

ALDERSON, B.—I am of the same opinion. With respect to the evidence in the first place, the statement of the defendant

is an admission that the place where he got the coals belongs to the mine which the plaintiffs are working. And I think the act of ownership exercised in one part of the mine is evidence of the plaintiffs being in possession of the other part. The effect of that act can not be confined to the very spot from which the party is exhausting the mineral. It might as well be said that when a man stands on the surface of a field he is exercising an act of ownership upon that part only on which his foot rests. Coupling these two facts together, I think there was quite sufficient evidence for the jury of the plaintiffs being in the possession of the spot trespassed on. As to the amount of damages, I quite concur with my brother Parke.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

WEST V. LANIER.

(9 Humphreys, 762. Supreme Court of Tennessee, 1849.)

Ouster defined. An entry on the land of another under assertion of title is an ouster; otherwise a mere trespass.

¹**Mining amounts to possession—Disseizor may not recover mesne profits before re-entry.** Defendant entered upon a tract of land under claim of title and removed iron ore therefrom, from time to time, to supply an adjoining furnace, but without any actual inclosure or residence thereupon. On this state of facts it was *held*, 1. That such entry and removal of ore constituted an actual possession and defeated the constructive possession of the true owner. 2. That the owner was entitled to damages in trespass for the disseizin, but not for subsequent injuries to the freehold, till he had recovered possession.

West obtained a grant from the State for twenty-five acres of land, lying in Perry county. Subsequently Dixon obtained a grant for fifty-two acres in the same county, which covered the land granted to West. Dixon sold the tract granted to him to Vanlier and executed a title bond to him. Vanlier cut timber on the land and dug and removed ore therefrom. He died. The title bond was returned to Dixon and he sold the land to Lanier and executed a deed of conveyance to him.

¹ *Huquin v. McCunniff*, 14 M. R.

Lanier placed slaves on the land granted to West, and they cut timber, and dug and removed therefrom, from time to time, to supply a factory, which he owned some miles from the land. He did not, however, reside on the land, nor did he build any houses for the slaves thereupon, or make any inclosure. The land was only valuable for the timber and ore. The timber and ore were removed under a claim of ownership by the title deed from Dixon.

West instituted this action of trespass against Lanier in the Circuit Court of Perry County, and claimed damages for timber cut and iron ore dug and removed.

It was submitted to a jury, and Hardin, special judge, charged them as follows:

“That though the right of property may come into controversy in the action of trespass upon property, yet the gist of the action is the injury done to the plaintiff’s possession. The plaintiff must prove, first, that the property was in his possession at the time of the injury, and this rightfully, as against the defendant; and second, that the injury was committed by the defendant with force. The possession of the plaintiff may be actual or constructive; and it is constructive when the property is either in the actual custody and occupation of no one, but rightfully belongs to the plaintiff, or where it is in the care and custody of his servant, agent or overseer. A disseizee, though he may maintain trespass for the original act of disseizin, can not have this action for any subsequent injury, until he has acquired the possession by re-entry, which will relate back to the original disseizin, and entitle him to sue in trespass for any intermediate wrong to the freehold. The defendant may prove that plaintiff had no property in the goods, or title to the land; so the defendant may show that the freehold and immediate right of possession are in himself, or in one under whom he claims title.

There are two grants produced on this trial. The party producing the grant founded upon the oldest entry has the best title. For the plaintiff in this cause to make out his case, if the proof shows that he was not in actual possession of the land in controversy, he must show a good legal title to the land in himself; which, if the land was unoccupied, would give him a constructive possession. If the defendant, under these

circumstances, entered upon the land in controversy and took actual possession of it, claiming the same by virtue of a deed, grant, or other assurance purporting to convey an estate in fee simple, and in thus obtaining possession he committed the alleged trespasses, he would not be guilty; for the moment he thus took possession the Statute of Limitations commenced running in his favor, and the only way prescribed by the act of 1819 to stop the running of the Statute of Limitations, after it has commenced running, is by the person having the better title to commence a suit in law or equity and prosecute it effectually. So if the proof in this case shows that the defendant did thus enter upon the land in controversy, and after thus having it in his possession he committed the alleged trespasses, this form of action can not be maintained against him, until the plaintiff commences and effectually prosecutes a suit in law or equity, and recovers possession of the land in controversy. The court further charged the jury that if the plaintiff was only in constructive possession, and the defendant took actual possession, claiming under a deed, grant, or other assurance purporting to convey a fee simple estate, he would not be guilty of such a trespass as can be remedied by this action. If the proof satisfies you that the defendant constantly occupied or used the land in controversy, in such a way as the land would alone admit of, claiming it by virtue of a deed, grant, or other assurance in fee simple, and continued thus to use and occupy it, such use and occupation would be an actual possession. Ordinarily, the law requires the constant occupation of improvements, such as houses, fields, or inclosures, to constitute an actual possession, but if the proof satisfies you in the present case that defendant, claiming as aforesaid such pits, dug ore and cut timber, and removed them, and that the land was fit only for these purposes, and not suitable to be used in any other way, the occupation and use of it in this manner would constitute an actual possession; and if the defendant, after having thus used the land in controversy, by himself or servants, temporarily suspended operations for a week, or even a month, or any short period of time, with the intention of again in a short time returning and resuming business upon the land, and he accordingly did so return and resume business, and use and occupy the same, as he had done before, such would be considered a con-

tinued, actual possession of the same." Verdict and judgment for defendant. Plaintiff appealed.

SCURLOCK, for the plaintiff.

B. S. ALLEN and JONES, for the defendant.

GREEN, J., delivered the opinion of the court.

This is an action of trespass *quare clausum fregit*, brought by West against Lanier, for digging ore from an iron ore bank. The plaintiff claims title by virtue of an older entry and grant. The defendant claims title to the same land by virtue of a deed of conveyance from a younger grantee.

It appears, from the bill of exceptions, that Samuel Vanlier built the Brownsport furnace in 1839, and in 1840 his hands were employed in digging ore at the bank on the twenty-five-acre tract in dispute; and that he continued so to work the same until his death, about the last of November, 1844. After Vanlier's death the furnace was run and ore was dug until about the 1st of January, 1845, when all the hands and mules were removed from the ore bank in question. About the 1st of February, 1845, the defendant's hands commenced cleaning out the pits and digging ore at the aforesaid bank and defendant has continued to raise and carry off the ore ever since that time. Vanlier claimed the land as his own under a title bond from Wallace Dixon, the grantee, and after his death the title bond was destroyed by the consent of all parties, and Dixon then sold the land to the defendant, who entered upon the same, claiming it as his own. This record does not show whether the possession of the defendant has any connection with Vanlier's previous possession and claim under the said title bond. The land is of no value except for the ore and timber.

The court charged the jury in substance, that if the plaintiff showed that the legal title to the land was in him, he would be in the constructive possession thereof when it was actually occupied by no one else; that a disseizee may maintain trespass for the original act of disseizin, but he can not have this action for any subsequent injury, until he has acquired the

possession by re-entry, which will relate back to the original disseizin, and entitle him to sue in trespass for any intermediate wrong to the freehold. But the court further charged the jury, that if the plaintiff was only in the constructive possession, and the defendant took actual possession, claiming under a deed, grant or other assurance purporting to convey a fee simple estate, he would not be guilty of such a trespass as will entitle the plaintiff to his action. If the defendant constantly occupied and used the land in such way as it would alone admit, claiming by virtue of a deed, grant or other assurance in fee simple, and continued thus to occupy it, such use and occupation would be an actual possession.

The jury found a verdict for the defendant and the plaintiff appeals to this court.

1. The plaintiff in error insists that the court erred in charging the jury that the use and occupation of the land in question, for digging ore, would be an actual possession. We do not think his Honor erred in this instruction. In the language of the court in *Ewing v. Burnet*, 11 Pet. 52, "an entry by one man upon the land of another is an ouster of the legal possession, arising from the title, or not, according to the intention with which it is done; if made under claim and color of right, it is an ouster; otherwise, it is a mere trespass; in legal language, the intention guides the entry and fixes its character." In the same case the court says: "Neither actual cultivation or residence is necessary to constitute actual possession (6 Pet. 513) when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property he claimed in his own right, and would not exercise over property he did not claim." In this case, the possession of the party consisted of digging and carrying off sand from a lot in Cincinnati, under a claim of title. The possession, the court decided, was sufficient to vest in him the better title, by the Statute of Limitations.

Judge Gaston says, in *Williams v. Buchanan*, 1 Ired. L. 540, "Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in

the character of owner, and not of an occasional trespasser. See, also, same book, 58; 2 Ir. L. R. 564; 4 Id. 310; 3 Dev. 36; 4 Humph. 59; 9 Yerg. 93; Mart. & Yerg. 58. From these cases it will be seen that an inclosure or residence on land is not necessary in order to constitute possession; but that such use and occupation of it, as from its nature and character it is susceptible under a claim of ownership, will be an actual possession.

2. But we think the court erred in telling the jury that if the plaintiff was only in the constructive possession, and the defendant took actual possession, claiming under a deed, grant, or other assurance purporting to convey an estate in fee simple, he would not be guilty of such a trespass as will entitle the plaintiff to this action. It is true that in England this action can not be supported, unless the plaintiff was in actual possession when the trespass was committed: Chit. Pl. 175, 177; 5 East, 485. But in this country a different rule has prevailed; and now it is well settled, that the party who has the legal title to land which is adversely occupied by no one, has a constructive possession thereof that will enable him to maintain trespass for an injury to the freehold: 11 Johns. 385; 9 Yerg. R. 311. The reason of this diversity is, that in this country a large portion of the lands are in the actual occupation of no one, and unless the owner were allowed to maintain trespass upon his constructive possession, those lands would be exposed to the ravages of every lawless wrongdoer: 9 Yerg. 312. Although, therefore, the plaintiff may be only in the constructive possession of land, and the defendant may have taken possession thereof, claiming it as owner, and thereby may have ousted the party having the better title, so that the Statute of Limitations may commence running in his favor, yet the first entry was a trespass for which he may maintain this action. Chitty says, 1 Chit. on Pl. 177, "A disseizee may have it (trespass) against a disseizor, for the disseizin itself, because he was then in possession; but not for an injury after the disseizin, until he hath gained possession by re-entry, and then he may support his action for the intermediate damage." This doctrine applies in this country to a disseizin where there was a constructive possession only, and entitles the true owner, who is thus ousted, to maintain trespass for

the first entry, but not for any subsequent acts. This court is not to be understood as holding a different doctrine from that here stated, in the case of *Polk v. Henderson*, 9 Yerg. 312. All that the court decided in that case is, that for acts done by a party in possession under a claim of title, trespass will not lie, and so we now hold. If, therefore, the defendant's possession has no connection with the previous possession of Vanlier, he is liable to this action for his first entry, but not for any subsequent acts.

Reverse the judgment and remand the cause.

TURNER V. REYNOLDS.

(23 Pennsylvania State, 199. Supreme Court, 1854.)

Where both parties claim under a common source, it is not necessary for plaintiff to trace his title beyond it.

Possessor sufficient against intruder. If the defendant be in possession as a mere intruder, it is only necessary to show the prior possession of plaintiff, without showing a legal title in him.

Lease not affected by prior agreement of sale. A son took possession of a coal vein under a parol agreement with his father (who owned a tract on which another and larger vein was opened) that he should have the smaller vein if he opened it. A lease was afterward made by the father to the son and others, by which the lessor "demised, let and to mine let," all the tract of land referred to, known as No. 49, and the coal bed thereon and now opened. *Held*, that after the lease the son with his co-lessees was in possession as tenant and not as owner.

¹ **Working one seam, evidence of possession of overlying seam.** Where a party had claim and color of title to all the coal in a certain tract, evidence of his working one bed may be given for the purpose of showing title by possession to an overlying bed on the same tract.

On cross-examination the defendant is to be confined to the testimony given by the witness in chief.

Executor as a witness for his testator's grantees. The executor of plaintiffs' grantor is a competent witness for plaintiffs in ejectment for the granted premises, even though the material part of the assets of the estate consist of the plaintiffs' bond for the purchase money, one of whom had declared to the executor that in case of failure to recover in the suit he would endeavor to get an abatement of the purchase money. His interest in the matter was too remote to affect his competency as a witness.

¹ *Crouch v. Puryear*, 15 M. R. —

¹ **Owner of minerals entitled to working surface.** One who has the exclusive right to mine coal upon land is entitled, even as against the owner of the soil, and so certainly against an intruder, to the possession of the land so far as it is necessary for such purpose. If the portion needed does not appear upon the trial, the court will presume as against a mere intruder that the entire premises are required.

Error to the Common Pleas of Luzerne County.

Ejectment by William C. Reynolds, and Jane, his wife, against Samuel G. Turner and Samuel Wadhams, for three acres of land in Plymouth, Luzerne county, being part of lot No. 49, called "New Holland." The plaintiffs claimed under John Smith.

The title to lot No. 49, containing 121 acres, was shown to be out of the commonwealth, but was not proved to have ever vested in the said John Smith. The *coal* on said lot No. 49 was conveyed to John Smith by two deeds, but it was alleged that title in the grantors to the land was not shown. Smith did not claim *the soil* of the tract, nor did the plaintiffs claim or assert any title to the land, their claim being confined exclusively to the coal on the tract.

As early as 1816 or 1820 John Smith went into possession of a coal bed on said tract known as the "Big Vein," and claimed the coal on the tract described in the deeds to him. He continued in possession of this coal bed for more than twenty-one years before the suit was brought, and on the 8th of December, 1848, he conveyed to William C. Reynolds and wife all the coal in lot No. 49. There are several veins of coal, two of which are opened. One vein, the first opened, is called the red ash vein or "Big Bed," which is a vein of about twenty feet in thickness, and is the same which John Smith had in possession for above twenty-one years before he conveyed to Reynolds and wife; the other vein opened is the white ash vein, or the "Little Bed," which is a vein of about seven feet in thickness, and overlays the "Big Vein" with rock, slate, etc., of from one to two hundred feet in thickness between these two veins. John Smith worked only the red ash vein or "Big Bed." The "Little Bed" or white ash vein was not opened until 1831 or 1832, when it was opened by Francis J. Smith, a son of John Smith, at a point on the tract about a half mile from the opening into the large vein.

¹ *Marrin v. Brewster Co.*, 13 M. R. 40.

John Smith had made some examinations in 1831 or 1832, and told his son Francis that if he would open the small vein he would give it to him. Francis soon after had search made for the small vein, found what was supposed to indicate it, set men to digging a tunnel, and in 1833 he got to the face of the coal of that vein; and he proceeded from year to year mining and transporting from the bed so opened by him considerable quantities of coal. Several witnesses testified that John Smith told Francis he might have the bed if he would open it; that he was there frequently while Francis was opening the mine; and one witness testified that he heard John Smith say to Francis that if he would open the bed he would give it to him; and Francis after that, in the presence of John Smith, hired the same witness to make the first opening, and it was made. Francis continued to mine yearly, after he opened the small vein, until he became embarrassed, in the fall of 1847; and on the 8th of January, 1848, he made an assignment of all his estate, real and personal, to V. L. Maxwell and Charles Denison, who proceeded to act as his assignees. These assignees sold the interest of Francis in the coal mines on the tract called "New Holland" to Samuel G. Turner and Samuel Wadhams, the defendants, who were creditors of Francis J. Smith, and conveyed the same to them by deed dated the 7th day of November, 1849. The said Turner and Wadhams, under this sale and conveyance, took possession of and mine coal in the "Little Bed," opened by Francis J. Smith, claiming to own the same in right of the said Francis.

On the trial of the case the *plaintiffs* proceeded to prove that John Smith went into possession of the premises described in the writ in 1811, and continued to use and occupy the same for mining coal till he sold the same to the plaintiffs, and then asked the witness as to the possession of John Smith of *the large vein*, on a part of the tract not included in the writ. The defendants objected to any evidence of possession of any coal bed, except that on the land described in the writ and mentioned in the plaintiffs' written offer. The court overruled this objection, and permitted the plaintiffs to prove the possession of John Smith in the large vein for the purpose of showing title to the smaller vein.

The defendants' counsel excepted, and this was the *first* bill of exceptions.

The plaintiffs proved by Samuel Ransom, that the coal business on the tract described in the deeds to John Smith, but not on the part demanded in this suit, was carried on by John Smith up to 1837. On the cross-examination of this witness, the defendants proposed to ask him whether Francis J. Smith and Samuel French did not carry on the coal business, each on his own account, long prior to 1837, on the same tract. The court rejected the proposed testimony, and that constituted the defendants' *second* bill of exceptions.

The plaintiffs offered Draper Smith as a witness. The defendants showed that the witness was the executor of the will of John Smith; that the assets of the estate consisted of the bond of William C. Reynolds for \$8,000, the balance of purchase money for the coal on lot 49, conveyed to him and wife by John Smith, and that Reynolds had informed the executor that if this suit should go against him, he would endeavor to get an abatement from the purchase money.

The admission of the witness constituted the defendants' *third* bill of exceptions.

On the trial of the case the plaintiffs gave in evidence a lease dated 10th February, 1840, from John Smith to Samuel French, his step son, Francis J. Smith, his son, and Draper Smith and William C. Reynolds, his sons-in-law, by which he "demised, let, and to *mine* let, all that tract of land situate in Plymouth township aforesaid, known as No. 49, in the 4th division of said township, containing 160 acres, more or less, and the coal-bed thereon, and now (then) opened," etc., for two years from the 1st of April then next, the rent to be \$600 per year. The said lessees agreed to work and carry on the aforesaid coal-bed "in a prudent, skillful and workman-like manner."

The lessees went into possession of the "Big Bed," and the plaintiffs claimed that this lease included the opening in the little vein made by Francis. This was denied by the defendants, who claimed that the lease did not, and never was intended to include the smaller vein.

In support of their allegations, the defendants gave evidence of declarations of John Smith, that he had given the little bed to his son Francis, etc.

The defendants claimed that John Smith offered to give

Francis the little vein of coal, if he would find and open it; and that in pursuance of such offer, Francis proceeded, found and opened that vein, and took possession under the parol contract, and that the title to the White Ash Vein or little bed, so discovered and opened by Francis, was vested in the defendants, as his grantees; also that it was a fact for the jury whether the lease of 1840 covered and included the little bed, to be determined by the terms of the lease, the testimony of Jameson Harvey and Alexander Gray, and the whole evidence in the cause; and that the title shown by the plaintiffs was under the Statute of Limitations and was only to the vein of coal of which John Smith had had possession for twenty-one years—possession under color of title not extending the possession of John Smith beyond the vein of coal worked by him and in his possession, and not to be held to give title to either the under or overlaying veins.

Further, that the plaintiffs' ejectment being for three acres of land—they showing no title in themselves, except to the coal, nor to any vein of coal except the large vein, the verdict in the case could not be a general one for the plaintiffs; nor could they recover the three acres of land under the evidence and the description in the writ; that if anything could be recovered by the plaintiffs, it was only the large vein of coal, and that it could not be recovered in an ejectment for the land, describing it as *land* in the writ.

There was given in evidence, on the trial, a certificate to Hezekiah Roberts, in 1802, for part of lot No. 49, and a patent to him in 1805. Also a deed by William Currie to Lewis Hepburn, in 1810, for coal bed on lot No. 49, reserving the fee simple in the soil, and reciting a conveyance by Roberts to Currie. Also a deed of Lewis Hepburn to John Smith, in 1811, for the one undivided half of the coal on the lot No. 49, and a deed of Patrick Hepburn and wife to John Smith, in 1816, for the other undivided half part of a certain coal bed or mine, on lot No. 49, with all other coal beds on said lot.

JORDAN, J., charged that the lease of 10th February, 1840, by John Smith to Francis J. Smith and others, if it covered the premises in dispute, was a bar to the title set up by the defendants. He observed that the construction of the lease was for the court, and the court thought the terms of it

covered the property in dispute. He said, "it embraces the whole of lot No. 49—all that tract of land, containing 160 acres and the coal bed thereon, and now (then) opened. It includes the property in dispute; there is no reservation or exception in the lease in favor of Francis J. Smith, or any other person, and the lessees leased the whole tract, together with all the appurtenances, and the whole premises thereto belonging. The acts of the parties are the best evidence of the extent and limits of the demise."

The court further instructed the jury that this was not such a case, in view of all the evidence, as satisfied the court that the defendants were entitled to hold the premises in dispute. The plaintiffs were entitled to a verdict. He observed that both court and jury were to be satisfied.

The court also charged (in answer to a point on part of defendants) that the action could be maintained, although not brought for the coal, but the land; and that the action might be maintained, although the evidence showed that John Smith was not the owner, possessor, or claimant of *the land*.

August, 1853, verdict was rendered for the plaintiffs.

In the first, second, and third assignments of error, it was assigned that the court erred in admitting the evidence specified in the first, second and third bill of exceptions. Fourth, in admitting the evidence of Miles C. Richards. (He testified, *inter alia*, that Francis J. Smith and others had the mines worked for some years, till stopped by John Smith, perhaps in October, 1847.) The fifth was to the instruction that the lease was a bar to the action—that it embraced the property in dispute. The sixth was to the instruction that this was not such a case in view of all the evidence as satisfied the court that the defendants were entitled to hold the premises in dispute, etc. Seventh, in charging that the action could be maintained, although not brought for the coal, but for *the land*; and that it might be maintained, although the evidence showed that John Smith "was not the owner, possessor or claimant of *the land*."

W. J. WOODWARD, H. WRIGHT, McCLINTOCK & MALLERY,
for plaintiffs in error.

H. B. WRIGHT, for defendants in error.

The opinion of the court was delivered by KNOX, J.

This was an action of ejectment brought by William C. Reynolds and wife against Samuel G. Turner and Samuel Wadhams for three acres of land in Plymouth, Luzerne county, part of lot No. 49, called New Holland. The plaintiffs claimed under John Smith, and the defendants under Francis J. Smith, the son of John Smith.

On the trial, the defendants alleged: 1st. That John Smith had no title to the premises in dispute. 2d. That if he had, it passed by parol gift or contract to his son, Francis J. 3d. That as the action was brought for land, and the evidence only showing title for the coal upon the tract, no recovery could be had in the action as brought.

First, as to the title of John Smith. It is only necessary to say that if Francis J. Smith's claim was derived exclusively from his father, and this was scarcely denied, the plaintiffs could not be required to trace the title beyond the common source under which both parties claimed. If the defendants were in possession as intruders merely, the prior possession of John Smith, and of the plaintiffs, was sufficient without showing a legal title.

It is very clear that the main contest between these parties turned upon the validity of the alleged parol gift or contract from the father to the son, and with the decision of the Court of Common Pleas upon this question we are entirely content. No other construction of the lease bearing date on the 10th February, A. D. 1840, could properly have been given, than that it included the right to mine the coal on the whole tract. Under this lease the possession was in all of the lessees as tenants in common. If Francis J. Smith ever had the exclusive possession of any portion of the tract, or the exclusive right to take coal from any of the openings, his possession after the execution of the lease was a joint one, and his right was under the lease and not in opposition to it. He was there as a tenant, and not as an owner. This disposes of the substantial points of the controversy. For the purposes of this trial the father's title was perfect, the son's good for nothing.

The reception of the evidence mentioned in the first error

assigned was proper. It had been shown that John Smith had at least colorable title to all the coal upon the tract, and his possession and occupancy by mining upon any portion of it was clearly pertinent. It is not to be supposed that he either could or would open mines upon every part of the tract at the same time.

The question put by defendants' counsel to Samuel Ransom was not a cross-examination, and therefore rightly excluded.

The interest of the executor was too remote to affect his competency as a witness.

Nothing is said in the argument of the plaintiffs in error as to the fourth bill of exceptions, and we can perceive no sufficient reason for excluding the evidence of Miles C. Richards.

The subject-matter of the fifth and sixth assignments has already been noticed.

The seventh and last error assigned is to that portion of the charge in which the court say, "that the action can be maintained, although not brought for the coal, but the land, and that the action may be maintained although the evidence shows that John Smith was not the owner, possessor or claimant of the land."

One who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as it is necessary to carry on his mining operations. What portion of the land in dispute was necessary for this purpose was not the subject of inquiry upon the trial. As against an intruder, where the exception is so purely technical, we will presume that the possession of the soil was requisite in order to enable the plaintiffs to avail themselves of their mining privileges. They have the right of entry for this purpose, which was denied them by the unwarrantable interference of the plaintiffs in error, who can not complain of injury, although dispossessed of the entire premises.

Judgment affirmed.

WOODWARD, J., having been counsel in this case, took no part in its decision.

FITZGERALD V. URTON ET AL.

(5 California, 308. Supreme Court, 1855.)

¹ **Hotel and town lots on mining ground.** The acts giving the right to mine upon land appropriated for grazing and agricultural purposes, do not apply to the case of a town lot occupied for hotel purposes. Lands settled in good faith, and built up as mining towns, must be protected as incidental to the business of mining.

Act legalizing trespass strictly construed. The occupant of land may, in every case, rely upon his possession as against a mere trespasser. In permitting persons to go upon public lands occupied by others, for the purpose of mining, the legislature has legalized what would otherwise have been a trespass, and the act can not be extended by implication to a class of cases not specially provided for.

Appeal from the District Court of the Ninth Judicial District, Butte County.

This was an action to restrain the defendants from the commission of a nuisance by reason of the digging of a ditch, and mining within the plaintiff's inclosure.

At the trial the court charged the jury that "if the plaintiff had possession and use of the lot claimed and improved, before the location and possession of a mining claim by defendants on said premises, the plaintiff is entitled to hold the same, and the defendants have committed a trespass and are liable in damages." To this instruction defendants' counsel excepted. The jury found a verdict for the plaintiff. Defendants appealed.

R. S. MESICK, for appellants.

The instruction given by the court was erroneous, and conflicts with decisions previously given by this court. See *Hicks v. Bell*, 3 Cal. 219; *Stoakes v. Barrett*, 5 Id. 36; *McClintock v. Bryden*, 5 Id. 97.

Jos. E. N. LEWIS, for respondent.

¹ *Lentz v. Victor*, 12 M. R. 211.

In support of the instruction cited *Winans v. Christy*, 4 Cal. 70; Prac. Act, § 621; 2 Black. Com. 10; 13 Geo. 469; *Hutchinson v. Perley*, 4 Cal. 33; *Hicks v. Davis*, Id. 67.

MURRAY, C. J., delivered the opinion of the court; HEDENFELDT, J., concurred.

This was an action in the court below to restrain the defendants from the commission of a nuisance by reason of digging a ditch and mining in the plaintiff's inclosure.

The facts are substantially, that the plaintiff was in possession of a small town lot in the town of Bidwell, on which he had erected a house used as a hotel; that the lot was inclosed by a substantial fence, and used as a poultry and wood yard, and for other purposes necessary to carry on the business of hotel keeping; that the plaintiff had for a long time been in the quiet use and possession of said premises, and that the defendants, claiming a right as miners, entered upon the lot, and by digging and sluicing, had greatly damaged the plaintiff and inconvenienced him in his business, and threatened, if not restrained, to entirely ruin his possession.

Several grounds of error are assigned by the appellants, none of which are well taken.

First, it is supposed by the appellants that the allegation of possession and title in the plaintiff was insufficient to enable him to maintain the action, and that he ought to have shown that his possession was consistent with the statute of this State regulating pre-emption claims, and that he had complied with the provisions of the act. Such is not the case. The occupant of land may in every case rely upon his possession as against a mere trespasser, and the fact that the land is the public domain of the United States, or land containing the precious minerals, will afford no authority to strangers or third persons entering upon his possession except in cases allowed by statute. These cases are, first, where the land is used for grazing; and second, for agricultural purposes.

The legislature of our State, in the wise exercise of its discretion, has seen proper to foster and protect the mining interest as paramount to all others. In permitting miners, however, to go upon public lands occupied by others, it has

legalized what would otherwise have been a trespass, and the act can not be extended by implication to a class of cases not specially provided for. Neither do we think that the occupation of the lot by the present plaintiff for the purpose of hotel keeping is inconsistent with the policy of the State with regard to mining claims.

The interests and wants of the mining communities demand that some facilities and accommodations should be afforded to the business of mining, and that persons settled in good faith upon lots in the mining towns, and carrying on business, should be reasonably protected, and not left at the mercy of any malicious or irresponsible party who may choose to invade their possession, upon the specious pretext of mining.

From an examination of the facts it will be observed that this case differs materially from the case of *McClintock v. Bryden*, 5 Cal. 97, and other cases heretofore decided by us.

The instructions of the court below are substantially correct, and no error appearing to us, the judgment is affirmed, with costs.

PENNSYLVANIA MINING CO. v. OWENS & CO.

(15 California, 135. Supreme Court, 1860.)

Certificates of stock to prove possession. Plaintiffs, in ejectment for mining ground, were an ordinary joint stock company, or partnership, claiming by purchase and transfer from the company originally locating the claims; the practice of the company was to issue to members certificates of stock, which certificates constituted the only evidence of membership recognized by the company. Transfers were made by assignment of the certificates: *Held*, that these certificates, and their assignments, their execution first being proved, were competent and proper evidence to prove possession.

In ejectment plaintiff must recover on strength of his own title. The court instructed the jury, 1st, that if they found that plaintiffs located their claim as now claimed, before the location of defendants' claim, they should find for the plaintiffs; 2d, if they found that defendants never located any claim adjoining plaintiffs' claim, they should find for the plaintiffs: *Held*, that the instructions were wrong, as violating the principle that plaintiff must recover on the strength of his own title; that defendants, having been in actual possession for a

long time, were not required to show anything beyond it, until a paramount right was shown in plaintiffs; that it was not essential to defendants' possession to show that they had ever formally *located* their claim in accordance with any mining regulations, or that they had or claimed any other mining ground.

Appeal from the Tenth District.

For the two instructions from the court, see syllabus.

The jury found for plaintiffs. Judgment was entered, perpetually restraining defendants from going upon or interfering with the ground in dispute. Defendants appeal.

REARDAN & SMITH, for appellants.

J. O. GOODWIN, for respondents.

COPE, J., delivered the opinion of the court, FIELD, C. J., concurring.

The parties to this action are mining companies, and are the owners of claims situated upon opposite sides of the same hill. It is alleged in the complaint that the defendants are in possession of ground belonging to the plaintiffs, and constituting part of their claims, and restitution of the possession and an injunction are prayed for. The defendants admit that they are in possession of the ground described in the complaint, but deny the title of the plaintiffs and set up title in themselves. The plaintiffs are an ordinary joint-stock company, or common partnership, and claim to have acquired their interests by purchase and transfer from the original members of the company. On the trial of the case, it was shown to have been the practice of the company to issue to members what were called certificates of stock, and it was further shown that these certificates constituted the only evidence of membership recognized by the company. Transfers were effected simply by assignment of the certificates, and a notice thereof in the books of the company. These certificates, with the assignments indorsed thereon, were produced and read in evidence, for the purpose of showing the interest of the plaintiffs and their right to maintain the action. Their introduction was

objected to on the ground of irrelevancy, and also on the ground that no proof was made of their execution. The first ground of objection is certainly inadmissible. The plaintiffs could rely for recovery either upon title or possession, and upon the question of possession the certificates were competent and proper evidence. We think, however, that their execution should have been shown, and that the objection on this ground was well taken and should have been sustained.

The instructions asked by the plaintiffs were erroneous, and should have been refused. The fact that the claims of the plaintiffs were first located was not of itself sufficient to entitle them to recover. What was meant by the term location is not very clear, but it must have been used with reference to some mining regulation, and not in the sense of possession acquired by occupation. The defendants were and for a long time had been in possession of the ground, and actually engaged in mining upon it, and until a prior and paramount right was shown to exist in the plaintiffs they could rest securely upon their possession, and were not required to show anything beyond it. It was not essential to the protection of their possession that they had ever made a formal location of their claims. These instructions are in conflict with the principle that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary.

Judgment reversed, and cause remanded for a new trial.

ENGLISH ET AL. V. JOHNSON ET AL.

(17 California, 107. Supreme Court, 1860.)

Prior possession without location. Though the regular and usual way of obtaining possession of mining claims be according to the mining regulations of the vicinage, still a prior possession, not so taken, is good, as against one subsequently taking possession in the same way.

¹ **The acts required as evidence of the possession of a mining claim** are those usually exercised. A miner is not required to reside on his claim, nor build on it, cultivate nor inclose it. He may hold possession himself or by his agents or servants.

¹ *Strepey v. Stark*, 7 Colo. 614.

¹ **Pedis possessio.** Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy, or work done, be only on a part. The rule which applies to agricultural lands, and requires a more strict interpretation of a *possessio pedis*, does not apply to mines.

² **Possession without proof of location.** A plaintiff need not show, in ejectment, in the first instance, that he had a possession taken in accordance with local laws, but may rely upon proof of the possession alone, until defendant shows that such possession was wrongful.

A party taking up a claim in excess of the legal limit may hold the excess against a mere intruder but not against a subsequent locator.

Book of district rules as evidence. The defendants having in court a book containing the mining rules of the district, offered in evidence an extract therefrom. *Held*, that the court properly ruled that the evidence should be excluded unless the rules were offered as a whole.

The exclusion of an admission not shown affirmatively to have been relevant will not be considered error.

Appeal from the Sixteenth District. Suit for the possession of a piece of mining ground—there being five defendants. The complaint avers ownership and former possession in plaintiffs, and ouster of a portion of the claims by defendants; and contains allegations for an injunction, which need not be stated. It also avers that the mining ground “was located, and the possession thereof acquired by those under whom plaintiffs claim said ground, on or about the twentieth day of November, 1857.”

The description of the ground is as follows: “That piece or parcel of mining ground situate, lying, and being on Pompey’s Hill, near the village of Lancha Plana, in the county of Amador, and State aforesaid, and particularly described as follows, to wit: Beginning at a stake at the southwest corner of said ground, and running from thence northerly three hundred and ninety-six feet to a stake; thence easterly one hundred and forty-one feet to a stake; thence southerly three hundred and thirty-seven feet to a shaft, now filled up; thence westerly three hundred and three feet, to the place of beginning; the same being bounded on the west by mining grounds claimed by Newman & Co. and Weller & Co.; on the north by ground claimed by Kidd, Weller & Co.; on the east by ground claimed by Kidd, Goodwin & Co. and Waddell & Co.; and on the south, by the claims of Pierce, Donnelly &

¹ *Boardman v. Thompson*, 6 M. R. 240.

² *McKinstry v. Clark*, 4 Mont. 370; *Noyes v. Black*, Id. 527.

Co.; said mining grounds being marked by a ditch surrounding the same."

The substance of the answer is a denial that the premises were located, or the possession thereof acquired, by those under whom plaintiffs claim, in November, 1857, or at any other time, to a greater extent than two claims of one hundred feet square, lying upon the extreme southern end of the premises; or that the premises have ever been in the possession of plaintiffs, except those two claims, and another portion, of which defendants are not averred to have ousted plaintiffs; and averments that defendants entered lawfully upon the northern portion of the premises of which they are charged to have ousted plaintiffs; that plaintiffs pretended, on the day of defendants' entry, to be owners and in possession of the entire premises, but that the premises covered a much larger extent of ground than the mining customs, rules and regulations of the district permitted; that, by such custom, when a party desired to locate a piece of mining ground sought to be held by another in excess of the quantity allowed, he was required to call upon said other party to adopt and point out such boundaries as should include only the allowable quantity of ground; and in case of refusal the party desiring to locate had himself the right to enter and take possession of the allowable quantity, providing there be left to the party refusing to point out his boundaries sufficient ground, including that actually occupied by labor for mining purposes, to make up the customary quantity; and that defendants did, in pursuance of this custom, enter upon the premises in dispute.

From the evidence, it appeared that in October, 1857, one Donnelly and his brother, and two others, located four claims; that they afterward divided, and he and his brother took two claims on the south end of the ground now claimed by plaintiffs, and the other men the two adjoining claims; that his brother then took up ground north of these two claims; that they, with this ground, constituted the ground described in the complaint; that the whole was marked out by a small ditch, such as miners usually make to designate their lines, which ditch could be easily traced—being continuous, except in some places where chaparral intervened, and there the chaparral was cut away, so as to form the line; that in May,

1858, plaintiffs came in with Donnelly and brother, to aid in working the ground, and were allowed equal interests; a shaft was sunk and pump put in; and in two weeks Donnelly and brother sold out to plaintiff and left.

At this time plaintiffs put up notices, on the ground, of what they claimed, and were in full possession, so far at least as that no one claimed adversely. The ground could not be worked without draining—the water being reached in the shaft before the pay dirt. Plaintiffs were constantly at work, with pump and shaft, on the ground within their lines, during the summer and fall of 1858; and were so working when defendants took up about three claims on the northern portion of plaintiffs' claims, sunk a shaft and began working. Plaintiffs had done no work within those claims taken up by defendants. The whole ground claimed by plaintiffs is five and one third claims, of one hundred feet each; and that claimed by defendants a little over three claims.

On the trial defendants introduced as a witness, Little, who testified that he had a conversation with plaintiff McIntyre in June, 1858, in regard to the extent of ground claimed by his company—these plaintiffs. Witness was then asked by defendant as to the declaration of plaintiff McIntyre, in June, 1858, that plaintiffs claimed but five claims of the ground set forth in plaintiffs' complaint. This being objected to by plaintiffs, the court held the evidence inadmissible unless defendants could connect it with the acts of defendants in entering upon the ground claimed by plaintiffs, or that said declaration, if made, induced them so to enter. Defendants failing to show that the declaration, if made, was made to defendants, or that they had ever heard of such declaration, or that they were in any manner influenced thereby in the premises, the court ruled the same to be inadmissible—defendants excepting.

Defendants also offered in evidence one section or article of what purported to be the written laws of the camp; to which plaintiffs objected, unless the whole of the laws were offered in connection with this section. The court held that if defendants relied upon the laws of the camp, they must offer the laws as they were, and not an isolated part. Defendants refused to offer the entire law, and the court ruled out the single section—defendants excepting.

The court charged the jury that the law is uniform throughout the State; the same principles which regulate rights to the possession of lands in the agricultural districts, also regulate those rights to the possession of lands taken and held for mining purposes, in the mining districts; but that the *indicia* of possession or the character of the boundaries are not necessarily the same in the mining as in the agricultural districts; that the objects for which the lands are taken, and the usual course taken to secure those objects, are unlike; that the necessity which exists for fencing in agricultural districts in order to obtain exclusive possession, does not exist in mining localities, where no importance is attached to the exclusion of the cattle or other animals belonging to others; that if the jury find from the evidence that the ground in dispute was included within distinct, visible and notorious boundaries by the plaintiffs, or those under whom the plaintiffs claim, and that before and at the time of defendants' entry plaintiffs were occupying, by work, any portion of the ground within those boundaries, then the possession of plaintiffs extended to those boundaries, and they are now entitled to recover; that if the jury find that said grounds were not included within such distinct, visible and notorious boundaries, and that the plaintiffs are driven to invoke the aid of mining customs to give sufficiency to boundaries which would have been otherwise deficient, and to confer upon them a constructive possession to the extent of those boundaries, then, in order to find for the plaintiffs, they must also find that in the taking up of said ground the plaintiffs, or those under whom they claim, complied with such mining customs as have been shown to have existed, and that no more ground has been taken than was permitted by those customs.

Defendants excepted to the charge, and asked the court to charge as follows:

"That if the jury find from the evidence that customs were established and in force at the diggings embracing the grounds in dispute at the time such grounds were originally sought to be located and held for mining purposes, regulating and limiting the manner and extent of locating and holding grounds for such purposes, and that such customs have since then continued, and still remain in force, the plaintiffs, in order to recover, must show a right to the possession of the ground in

dispute consistent with such customs." Refused—defendants excepting.

Verdict for plaintiffs; judgment accordingly. Defendants appeal.

J. F. HUBBARD, for appellants.

ROBINSON, BEATTY & HEACOCK, for respondents.

BALDWIN, J., delivered the opinion of the court, FIELD, C. J., concurring.

The main question in this case arises upon the instructions given by the court upon the trial. The case was brought to recover certain mining claims. The court charged the jury, in effect, that possession taken, without reference to mining rules, of a mining claim, was sufficient, as against one entering by no better title, to maintain the action; and further, that this possession need not be evidenced by actual inclosures, but "if the ground was included within distinct, visible and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries," this was enough as against one entering without title. We see no objection to this ruling. In the late case of *Attwood v. Fricot*, 17 Cal. 37, we lay down some rules on this general subject. The taking up of mineral land in pursuance of the mining regulation of the vicinage gives possessory title to the claims, just as an entry in the land office, or the following of the prescribed rules given by statute gives a possessory title to public or agricultural land. But it does not follow, because this is the regular and usual way of obtaining possession, that a possession not so obtained would necessarily be without the protection of the law. Possession not taken in pursuance of these rules would still be good as against one not taking possession in accordance with the rules of the vicinage, but merely coming upon the premises in the same manner as the prior possessor. The actual prior possession of the first occupant would be better than the subsequent possession of the last.

The question arises as to the extent of the possession of the first taker, and the rules which determine this question. In mining claims we require no other acts as evidence of posses-

sion than those usually exercised by the owners of such claims. A miner is not expected to reside upon his claim, nor to build upon it, nor to cultivate the ground, nor to inclose it. The claim is usually of a small strip of land compared with the extent of ground generally taken up for agricultural purposes. Its only value is in working it and extracting minerals. A party may be in possession by himself, or by his agents or servants. Going on the lead to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting or preparing to extract minerals from it—as, for example, starting a tunnel a considerable distance off to run into the claim—would be a possession of the claim within the meaning of the rule. If, as we held in the case of *Attwood v. Fricot*, the party entered under written claim or color of title, his possession, except as against the true owner or a prior occupant, would be good to the extent of the whole limits described in the paper, though the possession be only of a part of the claim. In this case, it seems the plaintiffs took up, in connection with others, these claims sued for, marking and defining, in the way usual among miners, the limits; and also bought out the interest of two of their associates, original appropriators. But we think where a claim is distinctly defined by physical marks, that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on or of a part, and though the party does not enter in accordance with mining rules, or under a paper title. The rule which applies to agricultural land, and holds to a more strict interpretation of a *possessio pedis*, does not apply to such a case. Inclosure, if not impossible, besides being probably hurtful to other interests and rights, would be wholly useless. It would give no greater or better advertisement of the extent of the claim than these physical signs, nor give any better protection to the premises against intrusion, or show any higher power of dominion. Even actual possession, as applied to agricultural land, is from its nature somewhat constructive; for there is no such thing as a literal corporal holding of land, even within the limits of an inclosure. A house is said to be in actual possession though not occupied, the claimant having the key and exercising acts of dominion; and in truth, the whole doctrine of possession, if not created,

must necessarily be controlled and modified by the peculiar nature of the subject and by surrounding circumstances. If town lots are covered by deep water, would enclosure be necessary to give actual possession, or a possession of equal efficacy? And, if there were no timber, or other means of fencing, and no necessity or use for fences in a large district, could there be any sense in holding such acts necessary to protect a possession from intrusion? So of mining claims. Fences are not necessary to exclude cattle, nor to give notice of a claim to given limits; nor is the power or dominion over them at all increased or facilitated by this process. The custom of the country does not require so useless a formality. The physical marks upon and around the claim are sufficient to notify every one of the possession and claim of the possessor; and, by common understanding, the going upon a claim to work it is an appropriation of the entire claim, especially if that claim can be appropriated to that extent by location by one man. Possibly, if several distinct claims had been consolidated into one, and the rules of the locality allowed but one claim to be taken by one man, and after this consolidation a person went upon the consolidated claim to work, and did this without authority from the owner, then his possession might not be referred to the whole tract, but only to the particular claim upon which he entered. The question then might be one of intent; and it might be argued that it is not to be presumed that he meant to take and appropriate a greater quantity than that allowed to be appropriated by the rules of the vicinage. We see nothing in the law which would necessarily prevent a party from taking actual possession of mineral land, though in taking possession he did not observe the requirements as to registry and the like acts prescribed by the local laws. But if he took more land than these rules allowed, this would not give him title to the excess against any one who complied with the laws, and took up such excess in accordance with them. Much would depend upon the particular rules, and their right construction as to the effect of a registry, or the consequence of failing to make it. But in the absence of any rule declaring that a failure to record avoided the entry or claim, we can not see that this failure, when actual possession was taken by the claimant and kept—no forfeiture or abandon-

ment being shown—would avoid the claim, as against a subsequent entry and location in due form; much less would it have that effect, in favor of a mere intruder, claiming by no better title than the first claimant.

We do not hold that a party can, in defiance of mining rules, take up any quantity he chooses of mineral land, and hold it by merely putting up stakes or marking lines, or even inclosing it. All we hold is, that he can hold the quantity allowed to be taken up by him by the rules, without strictly complying with those regulations which prescribe the mode of taking, as registry, etc., so as to protect him in that quantity, as against one not claiming through the rules, unless, indeed, there be something to the contrary in the rules. And if a party takes up and marks out a larger claim than the rules allow, he is still entitled to keep and retain possession of it as against one merely entering without complying with the rules; but the possessor is not entitled to hold the excess against one entering in pursuance of the rules, for the entry of the last according to the rules gives him the title to such excess. But this whole matter can be and should be regulated by the miners, who have full authority to prescribe the rules governing the acquisition and divestiture of titles to this class of claims, and their extent, subject only to the general laws of the State.

In this case no law or regulation of the vicinage was shown limiting the plaintiff's right to hold to the extent of which he was in possession. *Prima facie*, being in possession, he was rightfully possessed, and no presumption can be indulged that such possession was in violation of any law, local or general. The plaintiff claims under purchase and location a small tract of land, with demarked limits, of which he was in possession; and in the absence of any proof that such claim is opposed to the local rules, we are unable to discover any principle upon which to hold that the possession is wrongful. The plaintiff need not show, in such a case as this, in the first instance, that he was in possession in accordance with the local laws; but may (as a vendee under a deed may as to other land) make a *prima facie* case upon possession; and this is enough until the defendant shows that the possession is wrongful, because in violation of rules which justify him in going upon the premises and working them.

2. The court properly ruled that the defendants must produce all the rules in the book of the district, and could not offer an extract or a single clause of the book. No harm was done by this requirement. The defendants had the book in court. The whole of the rules, making up the body of the local law, constituted one entire instrument—as a deed or other document containing various stipulations—and it was necessary, to a fair understanding of any one part, that the whole should be inspected. At least, there was no error in requiring the whole of these rules to be put in.

3. It is next objected that the court erred in refusing to permit the defendants to show by a witness that one of the plaintiffs admitted, in 1856, that he had more than five claims. We see no relevancy in this proof to anything in the issue, and its materiality ought to be made very apparent before we would reverse for such a cause. No offer was made to connect this testimony with other proof showing its relevancy. It would seem, at the first blush, that it was not important how many claims one or all of the plaintiffs had, if those claims were acquired by purchase, even if it were material to ascertain this fact in any aspect of the case. We are not disposed, unless compelled to do so, to give effect to mere technical exceptions taken in the course of a trial, when we can sustain a judgment which seems to be right on the merits.

On the whole case, we think the judgment should be affirmed.

LENTZ ET AL. V. VICTOR ET AL.

(17 California, 271. Supreme Court, 1861.)

¹ **Entry by miner upon agricultural land held adversely.** Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing, 1st, that the land is public land; 2d, that it contains mines or minerals; 3d, that he enters for the *bona fide* purpose of mining. And such justification must be affirmatively pleaded in the answer, with all the requisite averments to show a right under the statute, or by law, to enter.

¹ *Fitzgerald v. Urton*, 12 M. R. 198.

¹ **Possession of land as title.** A party in possession of public mineral land is entitled to hold it as against all the world—the government excepted, if the land belong to it—subject only to the qualification that, upon land taken up for other than mining purposes, a right of entry for such purposes may attach.

Appeal from the Fifth District.

Ejectment. The complaint, verified, avers that in May, 1860, one Grassini was, and for about three years prior thereto had been, the owner and in possession of a certain inclosed piece or parcel of land containing about four hundred feet square; that on that day Grassini sold to plaintiffs and others, whose interest plaintiffs subsequently purchased—the deraignment of title being set out; and that plaintiffs have ever since been and now are the lawful owners and entitled to possession of the land. Then follow the usual averments of entry and ouster.

The answer, verified, first denies generally each and every allegation in the complaint, and then denies that “plaintiffs are now or at the time mentioned in the complaint were the lawful owners, and entitled, as against defendants, to the possession of the property therein described,” and that defendants at any time “wrongfully and unlawfully entered upon and took possession,” etc., and evicted plaintiffs, etc. /

On the trial it was proven that in 1850 Smith and wife were living upon and owned a certain ranch, and that in 1858 they conveyed by deed to Grassini—plaintiffs’ grantor—the land being described in the deed as “Smith’s Milk Ranch on and near Knickerbocker Flat, inclosed with a fence and a part now under cultivation;” that Grassini took possession under said deed; that the property was fenced in and had a house, cow stable, corral and garden upon it; that the cow stable and corral were used solely for the purpose of herding Grassini’s cows, and were likewise inclosed by a fence inside the ranch; that the corral was one hundred feet square, and the cow stable one hundred feet long by twenty-two wide; that on the fourteenth May, 1860, Grassini conveyed by deed to plaintiffs the ground in question.

Grassini testified that he sold the lands to the plaintiffs for mining purposes, and that at the time they entered he had

¹ *Brennan v. Gaston*, 7 M. R. 426.

removed his improvements according to the agreement in his deed to them. There is no evidence showing the land to be public land.

The defense was that defendants claimed to have located a mining claim on the ground covered by the cow stable and corral, on the eleventh of October, 1858, and that defendants did not attempt to work the ground till the improvements were removed.

The view taken of the case by this court renders further facts unnecessary.

Verdict for defendants. Plaintiffs appeal.

H. P. BARBER, for appellants.

E. F. HUNTER, for respondents.

BALDWIN, J., delivered the opinion of the court, COPE, J., concurring.

The judgment in this case must be reversed.

We understand the pleadings to admit that the plaintiff was the owner of the premises, for the answer does not deny the specific allegations of the complaint which set up and affirm the plaintiff's title.

If the plaintiff had, as he alleges, the possession of this lot of ground as a milk ranch and corral, he was entitled to hold that possession as against all the world, the government excepted (if the land belonged to it), subject only to this qualification—that upon land taken up for other than mining purposes, a right of entry may attach for such purposes. But any one so entering can only justify his entry by showing, at least, first, that the land is public land; second, that it contains mines or minerals; third, that the person entering upon or against a prior possession, enters for the *bona fide* purpose of mining. But this being in the nature of a justification of the entry as against an apparent and *prima facie* right of the actual prior possessor, must be affirmatively pleaded in the answer, with all the requisite averments to show a right under the statute or by law to enter. This defense does not appear in the answer, or even by the proofs.

We do not decide in this case, even if this defense had been

properly set up, that the defendants would have been entitled to enter.

Judgment reversed, and cause remanded for further proceedings.

HAWXHURST ET AL. V. LANDER ET AL.

(28 California 331. Supreme Court, 1865.)

¹ **Possession good till better right shown.** One in the actual possession of real estate may rely on his possession alone until the opposite party shows a better right.

Possessory Act of 1852—Amended location not retroactive. An affidavit made under the Possessory Act of 1852, made with a view of securing a possessory right to a certain piece of land, which fails to describe a portion of the premises designed to be covered, can not be cured by a subsequent affidavit correctly describing the premises, if intervening rights have accrued, notwithstanding the boundaries were correctly marked with stakes in the first instance. The second affidavit must be treated as an original proceeding.

Prior possession superior to statutory right. Proceedings in accordance with the statute, to acquire a possessory right to land, would not give a right to recover their possession as against one who was then in the actual possession of it.

Appeal from the District Court, Fifteenth Judicial District, Contra Costa County.

Plaintiff appealed from an order granting a new trial.

The affidavit made by appellant in 1860, under the Possessory Act, described the boundaries of a tract of land commencing at a given point, and running thence west forty chains, thence north forty chains, thence east forty chains, and thence south forty chains to the place of beginning. Appellant was residing on the land, and continued to reside there, and made valuable improvements on the same.

The affidavit made in 1863 changed the boundaries of the land so as to include the twenty-seven acres in controversy. Appellant never lived on this twenty-seven acres.

¹ *McManus v. O'Sullivan*, 48 Cal. 17.

Appellant claimed that there were certain stakes and monuments marking the boundary of the land he intended to claim by the affidavit of 1860, but that by mistake the lines therein described did not follow the monuments, and that the affidavit of 1863 corrected the mistake.

The other facts are stated in the opinion of the court.

SELDEN S. WRIGHT, for appellant.

M. S. CHASE, for respondent.

By the Court, CURREY, J.

Ejectment for a parcel of land in the coal district in Contra Costa county. The land in controversy consists of about twenty-seven acres. The plaintiff claims it by virtue of proceedings taken under the act of the legislature entitled "An act prescribing the mode of maintaining and defending possessory actions on public lands in this State," passed in 1852. (Stat. 1852, 158.) The cause was tried by the court, a jury having been waived, and judgment was rendered for the plaintiffs, which was subsequently set aside, and a new trial granted. The court is asked to reverse the order granting a new trial.

The defendants being in possession of the premises demanded at the time this action was commenced, that possession must be presumed to have been rightful until overcome by evidence to the contrary. In *Hill v. Draper*, 10 Barb. 458, the court say: "The defendants in possession of disputed premises are presumed to have a valid title thereto, and the plaintiffs, to entitle themselves to recover, must overcome that presumption by proving title out of the defendants and in themselves. They must recover, if at all, on the strength of their own title, and not on the defects in that of their adversary. The possession of real estate is *prima facie* evidence of the highest estate in the property, to wit, a seizin in fee." It is a well-settled doctrine that a party in the actual possession of real estate is in the first instance to be deemed to hold the same by title or in subordination to the title, in whomsoever it may be. Therefore, it is not necessary to inquire by what

right the defendants have and hold possession of the disputed premises, until it is ascertained whether the plaintiffs have a better right.

On the 13th of August, 1860, Hawxhurst, one of the plaintiffs, made an affidavit with the view of securing a possessory right to a certain piece of land therein described. The parcel of land described consisted of one hundred and sixty acres. This affidavit was filed with the recorder of the county on the same day, and was recorded. On the 7th of March, 1863, Hawxhurst made another affidavit, having for its object the securing of a possessory right to public land under the act of 1852, which purports to be in aid of his first affidavit, and to enable him to comply with the provisions of the statute, and "to make a claim to the land" therein described, "if the former one did not." This affidavit was filed for record, and recorded in the recorder's office of the county on the day of its date. The particular piece of land in controversy was not included by the description contained in the affidavit first made by Hawxhurst. The statute provides the mode by which a right under the statute to the possession of public land may be acquired, and if the right sought to be acquired fails because of a substantial defect in the proceeding taken, we do not understand that the party himself can, by a proceeding subsequent, cure the defect. If the subsequent proceeding amounts to anything it must be as an original proceeding. So that, if Hawxhurst acquired any right to the land described in his second affidavit by the steps which he took in March, 1863, such right had its origin at that time. The plaintiff's counsel admit in argument that upon the affidavit of March, 1863, the plaintiff's whole case rests. If the plaintiff's reliance is on this affidavit, he must be limited to its date, at least, as the commencement of his right under the statute.

From the evidence in the case it would seem that for some time before March, 1863, the defendants had been in possession of the particular premises in controversy, extracting from the same large quantities of coal, and were prosecuting the work of mining for coal when Hawxhurst made his second affidavit. It does not appear that at that time Hawxhurst was settled upon and occupying the land in controversy, or that he thereafter, before this action was commenced, occupied or was

settled upon it "for the purpose of cultivating or grazing the same," or for any other purpose. The mere making of an affidavit in conformity with the provisions of the statute, and procuring the same to be duly recorded, and causing the land described to be surveyed by the county surveyor, would not invest the affiant with the right to recover the possession of the property as against a person who was there, and before then in the actual possession of it.

What may be the merits of plaintiffs' claim to the possession of the twenty-seven acres in controversy we do not undertake to say, because the question is not in a condition to be fully passed on by this court; but we are clear that the plaintiffs can not depend, for the right which they claim, on the proceeding taken by Hawxhurst in August, 1860, under the act of the legislature already referred to, and also on the proceeding taken by him in March, 1863, under the same act. Without passing directly upon the particular points which induced the court below to grant a new trial, we are satisfied the order appealed from should not be disturbed.

Order affirmed.

Chief Justice SANDERSON expressed no opinion.

¹HESS ET AL. V. WINDER ET AL.

(30 California, 349. Supreme Court, 1866.)

Modes of holding a mining claim. A mining claim on the public domain may be held either by actual occupancy, and the exercise of control over it, by distinctly indicating the boundaries by monuments and marks, or by occupancy in accordance with the local mining customs.

Marks and stakes. The physical marks sufficient to serve as notice of the possession of a mining claim, must be of sufficient prominence to be found by one honestly concerned to discover whether the land has been previously appropriated for mining purposes.

Insufficient location. Posting notice upon a five-sided tract claimed for mining purposes, and the marking of three of its corners, in the absence of any mining district rule in the district: *Held*, no valid or sufficient location or possession.

Actual occupancy of part of claim. One who claims a tract of mining ground for mining purposes on the public domain, but is actually

¹ For injunction suit pending this action see *Hess v. Winder*, 34 Cal. 270.

occupying and working only one portion of it, can not recover damages for an entry by a stranger upon the tract beyond his actual occupancy, unless his boundaries were plainly indicated by marks or monuments, or there was some local mining custom allowing his possession to extend to the ground upon which the entry was made.

Constructive possession of claim under deed. One who enters upon a part of a mining claim under a deed, does not by the deed alone acquire a constructive possession to the entire claim unless the deed contains definite and certain boundaries which can be located, marked out and made known from the deed alone.

Omission in record—How supplied. Under the California practice, a deed referred to in the statement filed on motion for new trial, but not embodied therein, may be annexed thereto by appellants, accompanied with a certificate of the judge who tried the case that it is the deed mentioned in the statement and in his judgment denying the motion, and may thereafter be printed as part of the transcript of the record.

Appeal from the District Court, Tenth Judicial District, Sierra County.

Plaintiffs recovered judgment in the court below, and defendants appealed both from the judgment and from an order denying a new trial.

The other facts are stated in the opinion of the court.

VAN CLIEF & GEAR, for appellants.

CREED HAYMOND and J. A. JOHNSON, for respondents.

By the Court, CURREY, C. J.

This action was brought to recover damages for trespass *quare clausum fregit*, and also to obtain equitable relief by injunction against a continuance of trespasses of the character alleged in the complaint. Upon the issue joined between the parties, the plaintiffs' right and title to the *locus in quo* was the main fact litigated. The plaintiffs obtained a verdict for a small sum as damages, and a special verdict to the effect that the land described in the complaint embodying the particular locality of the alleged trespass was the property of the plaintiffs at the time this action was commenced. Judgment was entered on the verdict, and, in addition, the court made a decree perpetually enjoining the defendants from entering

upon and working in any manner the land, which was mining ground, described in the complaint. In due time after verdict, judgment and decree, the defendants moved for a new trial upon a statement prepared for the purpose. The application was denied, and the defendants have appealed.

The error assigned by the defendants, when stated in general terms, is that the verdict was not in accordance with the evidence, and wholly unwarranted by it, and that the court erroneously refused to vacate and set it aside, with the judgment and decree that followed thereon.

It was proved on the trial that since October, 1863, and before this action was commenced, the defendants had worked upon, and from the mining ground described in the complaint had taken and removed seven hundred or eight hundred square feet of gold-bearing earth. To establish their right and title to the mining land thus entered upon, the plaintiffs produced witnesses to show that their right and title thereto had its inception in May, 1858, and had become perfected before the commission of the trespasses alleged. It does not appear that the location which the plaintiffs' grantors attempted to make was in accordance with any custom, rule or regulation of the miners of the district of country embracing the land in question. Therefore the plaintiffs' right to maintain their action necessarily depends upon other evidence than a location of the land on which the defendants entered, under and in pursuance of the customs, local laws and regulations of the miners of that district.

The plaintiffs claim that in May, 1858, one Stowell and eleven other persons, calling themselves the "American Company," posted a written notice on a certain fir tree, which was made the center of their base or front line, by which they gave notice that they claimed a tract of land described as follows: Beginning at said fir tree, and thence running in a southwesterly direction five hundred feet; thence in a direct line to the summit of the main dividing ridge; thence up along the summit of said ridge one thousand feet; thence down the hill in a line parallel with the second mentioned course to a point five hundred feet in a northeasterly direction from said fir tree, and thence five hundred feet to the place of beginning. Early in the following June two of the company

marked the corners at the extremes of the line forming the base of the area described, by blazing a tree at each of such corners, so that a line drawn from one of these corners to the other passed through the fir tree on which the notice was posted. Having marked these corners, they then attempted to measure from the initial point through the center of the tract described to the summit of the main dividing ridge between Slate creek and Canyon creek, but, owing to impediments, were unable to do so with accuracy. When they reached the summit of the ridge they blazed on a tree there, and wrote upon it the words: "Summit or back line of the American Company's Claims." The tree at the summit of the ridge was intended to designate the center of the back line of the American company's claims as nearly as practicable. Before this measurement and location was made, the American Company, by one of its members, whose name was Stowell, applied to the members of the "Last Chance Company," a mining association claiming a tract of land lying to the south of the American company's claim, to designate the northeast corner of their claim at the dividing ridge, and was informed by them that their claim extended fifteen hundred feet in width up along the summit of the ridge, and they told Stowell to make the location of the American company running to the northeast corner of the Last Chance claim.

Two maps were produced in evidence, exhibiting the respective claims of these two companies, from which it appears that the tract of land claimed by the American company extended from the fir tree, the initial point, eastward to the ridge nearly three thousand feet, with the Last Chance company's claim lying next to the south of it.

Some time prior to December, 1859, the Last Chance company changed its name to Golden Gate company, and in the month last named, this company, under their new name, made a survey of its land, and then for the first time marked and attempted to establish its northern boundary line, fixing its northeast corner on the summit of the dividing ridge about one hundred feet south of the blazed tree marked on behalf of the American company at the back line on the dividing ridge. From this corner the Golden Gate company ran its northerly line in a northwesterly direction parallel

with the southern boundary line of the American company's claim as originally designated. While the Golden Gate company was marking out its northerly line, the American company complained that the former was taking a portion of the ground of the latter; in answer to which, the members of the Golden Gate company replied that they would finish their survey and then determine whether or not they were taking any portion of the American company's ground. After this survey was finished, the Golden Gate company conceded that this survey included a portion of the ground claimed by the American company, and thereupon informed the last named company that the Golden Gate company would throw off to it five hundred feet of the ground so surveyed, and that the American company might survey or mark it off whenever it pleased. Nothing more was done on the subject until July, 1860, when the American company employed a surveyor by the name of Carter to make a survey of its ground, and to definitely locate the line between the claims of the two companies. A survey was accordingly made, by which the American company fixed the southwest corner of its claim at a point about eight hundred and seventy feet, as appears by one of the maps in evidence, easterly of the base line of the claim as originally established, and about three hundred and twenty feet north from its original southern boundary. From this corner the surveyor ran a line considerably south of east toward the dividing ridge between Slate and Canyon creeks, fourteen hundred and eighty-five feet, to the "St. Louis road," marking trees and setting stakes on the line. He also set a stake on the line about one hundred and fifty feet beyond the road toward the dividing ridge. The northwest corner of the land now claimed by the American company was marked by a stake at a point about eleven hundred and thirty feet northerly of the last named initial point. From this northwest corner a line was run toward the dividing ridge on a line parallel to the southern boundary of the same tract and distant therefrom one thousand and eighty feet, to a point very near to and east of the St. Louis road. This line, to the extent it was run out, was marked by monuments, the last of which was a blazed tree near and on the east side of the road. The base or front line of the Carter survey was also marked by stakes and blazed

trees. It does not appear that the lines of the tract of land now claimed by the plaintiff were actually run by the surveyor beyond the monuments near the St. Louis road, on the east side of it, nor that the boundaries of the land were otherwise marked by monuments than as already stated, though the American company directed him to survey the side lines to the summit of the dividing ridge. That he did not do so for want of time affirmatively appears from the statement. It is agreed by the parties that the dividing ridge mentioned between the points where the side lines, if extended, would reach the same, was well defined. It was in evidence that it was Carter's usual custom in surveying a claim, situated, as were those named, upon a hillside running back to the summit, to mark the front corners, and run a distance on each side line, and to mark it so as to sufficiently indicate the corners, relying upon the summit of the hill as marking the back line, and then to make a map of the survey, indicating by double lines the part actually surveyed and marked by monuments, and indicating the part not actually surveyed by dotted lines; and that he had so made the survey and map produced on the trial. At most the survey actually made and marked by monuments embraced only the portion of land lying between the base line on the west and a line drawn from the extreme eastern monument on one side line to that on the other side line, near the St. Louis road, and between the parallel lines on the north and south. The distance from the southwesterly corner of Carter's survey along the south line run by him to the St. Louis road is eighteen hundred and forty-five feet, and to the monument standing on that line east of the road, one hundred and fifty feet more, while the entire distance from the initial point of Carter's survey to the dividing ridge is twenty-nine hundred and fifty-seven feet. The distance represented by the dotted line on the southern boundary as protracted is thirteen hundred and twenty-two feet. The *locus in quo* is four hundred and eighty feet east of the most eastern monument on this southern boundary line, and six hundred and thirty feet east of the St. Louis road. The northern boundary as protracted from the blazed tree immediately east of said road, and which tree is the most eastern monument on that line, corresponds in character with the pro-

tracted boundary line on the south. These lines, it appears, were destitute of monuments necessary to indicate, in connection with the crest of the ridge, the tract of land which the American company claimed as their mining grounds. There was nothing east of the St. Louis road which would have advised the most vigilant observer that the land between the protracted side lines of the American company and the road and ridge was in the possession of the plaintiffs or any other private claimants.

WHAT CONSTITUTES POSSESSION OF A MINING CLAIM.

Where a party relies on prior possession as evidence of his right and title to land, he must establish by proof his occupancy of it, or his dominion over it. Before the plaintiffs were entitled to recover, they were bound to show their right as against the defendants, to the land entered upon. To show this, otherwise than by a paper title from some paramount source, it was incumbent on them to prove their prior possession or appropriation of it, in some mode which the law sanctions. Possession is presumptive evidence of title; but it must be actual. By actual possession is meant a subjection to the will and dominion of the claimant: *Coryell v. Cain*, 16 Cal. 573. In *English v. Johnson*, 17 Cal. 115, the court recognizes a difference between the acts essential to indicate the possession and occupancy of agricultural land, and those necessary to show occupancy and dominion of a mining claim.

The court say: "We think when a claim is distinctly defined by physical marks, that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on or of a part, and though the party does not enter in accordance with mining rules or under a paper title." This authority not only recognizes but clearly indicates that the right to the possession of a particular piece of mining ground, on the government domain, must be established by evidence of its appropriation by the claimant by means which, in view of the nature of the subject and of the surrounding circumstances, will give notice to those who have a right to know that the particular mining land is subjected to the dominion and control of some private claimant. "Physical marks upon and around

the claim," the court say, "are sufficient to notify every one of the possession and claim of the possessor." But such physical marks must be of sufficient prominence to be found by one honestly concerned and diligently endeavoring to discover whether the land is claimed by some other person for mining purposes. While it has been the object and endeavor of the courts of this State to protect miners in the enjoyment of their mining locations on the public lands, justice and policy, at the same time, require some practical mode of notifying others of the extent of their claims. What the mode shall be, and what the extent of a mining claim may be, is generally regulated by the miners of the particular locality, whose rules in this respect are adopted as rules of law. But in the absence of evidence of any such rules or of the custom of miners in the particular district, we must apply the general rule governing in such cases, which general rule, distinctly stated, is that the boundaries of the land claimed for mining purposes must be indicated by such distinct physical marks or monuments as will fairly advertise to all concerned where and what it is, or in other words, its extent. The establishment of the base or front of the plaintiff's claim, and the running of the side lines to a short distance east of the St. Louis road, and the marking of trees and the erection of monuments to the extent the survey was made, could not have the effect to give to the plaintiffs or their grantors possession or the right to the possession of the body of land lying between the lines of the surveyor when protracted. It appears from the statement that the American company directed the surveyor to survey the side lines to the summit of the ridge, which he failed to do, "for want of time." This fact in our judgment, is of no moment. The fact is that no visible monuments or marks designating the boundaries of the land, were ever established beyond the lines actually surveyed. This being so, the American company did not acquire possession or the right to possession of it.

CONSTRUCTIVE POSSESSION OF A MINING CLAIM UNDER A DEED.

There is another ground on which the plaintiffs rely as establishing their right to the *locus in quo*, and on which they seek to support the judgment. In 1861, a corporation called

the "Indian Chief Company" acquired by purchase whatever right and interest the American company had in the lands called the American company's claims. At that time the Indian Chief company entered upon the claim at or near the western portion of it as originally located, and, in attempting to open and work the mine there, became involved in a large debt to Michael Canny. For this debt the corporation, at the request of Michael Canny, made and delivered to Charles Canny a promissory note, and to secure its payment executed to him a mortgage on the same property. This mortgage was foreclosed in the name of Charles Canny, and the property was sold by the sheriff and purchased by the mortgagee, to whom a deed of it was made in August, 1863. Charles Canny held the deed as trustee for Michael Canny, who entered into the possession of the property, claiming it of right as the *cestui que trust* of Charles Canny. After this Michael Canny, who is one of the plaintiffs in this action, sold to his co-plaintiffs certain interests in the property. The deed from the sheriff to Charles Canny described the land sold in the foreclosure suit as all and singular that certain mining claim held, owned, and in possession, on the 29th of July, 1862, of the Indian Chief company, situate at Tregaski's Flat, known and designated as the Indian Chief mining company, and "bounded on the north by the Manzanita claim, on the south by the Monte Christo claims." It is in evidence that Michael Canny had not obtained a deed from Charles. In the opinion of the learned judge denying the application for a new trial, he adverted to this circumstance, but held that in action of trespass the *cestui que trust* in possession is the proper plaintiff, and by misapprehending the language of the description in the deed from the sheriff to Charles Canny, he further held that the judgment should not be disturbed, because the plaintiffs were in possession under this deed, and that, having entered in good faith under color of title, and being in possession of a part of the land, they were in possession of the entire claim described in the deed, as against all persons except the true owner or prior occupant.

Assuming that Michael Canny and his co-plaintiff were in possession under the deed to Charles Canny, and had the right to maintain an action in all cases where they might if

the legal title under the sheriff's deed had been in them, it is important to inquire whether the deed itself described with certainty any particular tract of land. The boundaries given are the Manzanita claim on the north, and the Monte Christo claims on the south. The boundaries of the claims referred to may have been of no greater extent than the north and south boundaries of the land intended to be described in the deed in question, and yet they may have been. If a party relies on a constructive possession by deed, he must show himself in the actual possession of a part of the land described in it, and the description must be definite and certain as to the boundaries of the land. If the deed contains no definite and certain boundaries, which can be located, marked out, and made known, it can not have the effect to extend the possession beyond the *possessio pedis*, which is definite, positive, and notorious: *Hicks v. Coleman*, 25 Cal. 134.

The deed in question does not contain a description which could aid to extend the plaintiffs' possession by construction.

The plaintiffs, not having the possession or the right to the possession of the *locus in quo* at the time of the defendant's entry or subsequently, were not entitled to the judgment they obtained.

Judgment reversed, and new trial ordered.

SHAFTER, J., and SAWYER, J., dissent.

By the Court, CURREY, C. J., on petition for rehearing:

This case was passed upon by the court at the last January term, and the judgment was reversed and a new trial ordered. Upon application a rehearing was granted, and since then the cause has been re-argued by counsel for the respective parties.

It is objected, on behalf of respondents, that the sheriff's deed referred to in the opinion of the court heretofore delivered was not properly a part of the record in the case. It was not embodied in the statement settled and filed on the motions for a new trial, but it is annexed thereto by the appellants, accompanied by a certificate of the judge who tried the cause and passed upon the motion for a new trial, as the sheriff's deed to Charles Canny referred to in his opinion denying the motion for a new trial; which deed, he says, was

before him on such motion, but was not referred to in the argument.

The statute provides that on the argument of a motion for a new trial reference may be made to the pleadings, depositions and documentary evidence on file, and the minutes of the court as well as to the statement. Pr. Act, Sec. 195. In the statement, reference is made to the sheriff's deed, though it is not referred to as a part of the statement. In the opinion of the judge denying the motion for a new trial, he refers to it in direct terms as evidence of the plaintiff's right to recover. It appears therefore that the deed constituted a part of the evidence upon which the cause was tried, and upon which the court acted on the hearing of the motion for a new trial. We are of the opinion it is properly in the transcript of the record.

We have re-examined the case upon its own merits, and see no reason for changing the opinion already delivered.

The judgment must be and is hereby reversed, and a new trial ordered.

SHAFTER, J., and SAWYER, J., dissent.

GIBSON ET AL. V. PUCHTA.

(33 California, 310. Supreme Court, 1867.)

Priority gives the better title. Where the title of the respective parties to public mineral lands is based on possession alone, the older possession, as between the two, gives the better right, although the younger possession was for mining purposes.

Percolation into tunnel from irrigating ditch—*Sic utere tuo*, applied to interfering rights. Where defendant, owning an agricultural claim located prior to plaintiffs' mining tunnel, by the use of water for irrigation caused damage to the tunnel, through the percolation of the water in such quantities as to prevent working it: *Held*, that plaintiffs had no rights under the act of April 25, 1855, relating to mining upon inclosed lands; 2, that defendant was not liable, if the proper use of the water interfered with the later appropriation of plaintiff; 3, that the maxim, *sic utere tuo ut alienum non lœdas* applied, and defendant was answerable only for injuries caused by negligence or malice.

Appeal from the District Court, Tenth Judicial District, Sierra County.

This was an action to restrain the defendant from running water upon plaintiffs' mining claims, and for damages sustained thereby. The facts are set forth in the findings of fact made by the court trying the cause without a jury. The defendant had judgment, and the plaintiffs appealed upon the judgment roll alone. The findings of fact and conclusions of law of the court below are as follows, to wit:

"This cause was tried by the court without the intervention of a jury, and now from the pleadings and evidence I find the following facts:

"First. The ground described in plaintiffs' complaint is public mineral land of the United States, and contains mines of gold, and has been mined for gold, more or less, every year since 1851.

"Second. Said ground was originally located in four parcels, adjoining each other, by different companies, for mining purposes, in 1852. The company locating that parcel highest up the river was known as the 'Perseverance Company,' the next below as the 'Curry Company,' the next as the 'Michigan Company,' and the next, and farthest down the river, as the 'Out and In Company.'

"Third. The plaintiffs acquired the claims of all these companies by purchase as follows: the Perseverance claims on July 6, 1863; the Curry claims on December 5, 1862; and the Out and In claims and the Michigan claims on December 2, 1863. And plaintiffs have been mining on some portion of the ground during all the time it has been workable since the spring of 1863.

"Fourth. Plaintiffs traced their title to the Out and In ground and the Michigan ground in an unbroken chain in their predecessors from the fall of 1858, and to all the other ground described in their complaint from the spring of 1861; and plaintiffs have been in possession of each of the four different parcels from the date of its purchase.

"Fifth. The ground is situate on a flat, adjoining the south side of the river, and gradually rises as it approaches the mountain. A portion of the ground next the river, or front ground, as it is called, has been mined and worked from the

top down; but the bank formed by so mining it has become so high, and the boulders are so large, that the only practicable mode of working the remainder of the unworked ground, next the mountain, is by tunneling under it, and portions of it have been mined by means of such tunnels for several years.

"Sixth. About the 1st of May, 1866, the plaintiffs started a new tunnel under that portion of the ground known as the Out and In ground, and run it under said ground in the usual and only practicable way to mine the same, and run it about forty-five or fifty feet under said Out and In ground, when they were driven out by water, as hereafter stated.

"Seventh. In the summer of 1858 the defendant's predecessors fenced in a portion of the back ground of said claims for grazing and agricultural purposes, and cleared off about three quarters of an acre thereof, on which they planted and cultivated cabbage and other vegetables, and have continued to raise vegetables thereon every year since, except in 1862 and 1863.

"Eighth. During the winter of 1865-6, and the spring of 1866, the defendant cleared off about one acre more of ground on the back part of said mining claims, and adjoining the ground before cleared and cultivated, and built a new and more substantial fence around the whole lot.

"Ninth. On the 25th day of January, 1866, whilst defendant was clearing off said last mentioned parcel and building the last named fence, the plaintiffs notified him that he must not run any water on said mining claims, for any purpose whatever.

"Tenth. But the defendant continued to completion said clearing and fencing, and in the spring following planted the newly cleared ground, and a part of the old, in potatoes, and on or about the 16th of July following, for the purpose of irrigating said potatoes, diverted from Snake Bar ravine, which bounds plaintiff's said mining claim on the east, a sufficient quantity of water for irrigating said potatoes, and turned the same on the back part of the ground planted in potatoes, and run it across said ground toward the river.

"Eleventh. No part of plaintiffs' said tunnel was directly under the ground planted in potatoes, nor within less than one hundred feet thereof, but the water then run upon said potatoes

as aforesaid by the defendant, percolated through the ground and came out in said tunnel, then being worked and mined by plaintiffs, in such quantities as to prevent the plaintiffs from working or mining therein. The extreme back end of said tunnel is thirty-five to forty feet under the surface of the ground.

"Twelfth. That defendant continued to run said water on said potato ground from the time he commenced till the middle of October, 1866, and said water, during all that time, continued to percolate through said ground and run into said tunnel in such quantities as to prevent the plaintiffs from working and mining in said tunnel until after the said 15th day of October, 1866, and did prevent the plaintiffs from working or mining therein during all the time said water was being run on said potato ground as aforesaid.

"Thirteenth. That but for the running of said water on said potato ground as aforesaid, plaintiffs could have worked and mined in said tunnel during all the time said water was run on said ground as aforesaid.

"Fourteenth. That by reason of the premises, the plaintiffs have sustained damages in the sum of two hundred and fifty dollars.

"The conclusions of law from the foregoing facts are, that the plaintiffs are not entitled to the relief prayed for."

Judgment was entered for the defendant.

VANCLIEF & COWDEN, for appellants.

JAMES A. JOHNSON and W. CAIN, for respondent.

By the Court, RHODES, J.

The title of the respective parties is derived from possession and appropriation of the land, being public mineral land. The plaintiffs trace their title back to the fall of 1858, and the defendant's possession commenced in the summer of the same year. We understand that the small tract cleared off by the defendant during the winter of 1865-6 and the spring of 1866 was parcel of the larger tract, of which he took possession in 1858. This gives the defendant the better

title. The plaintiffs' tunnel did not extend to within a hundred feet of the grounds planted in potatoes by the defendant. The defendant diverted the water of an adjacent ravine and turned upon his ground a sufficient quantity to irrigate the crop of potatoes. The water percolated through the ground and came out through the tunnel, in such quantities as to prevent the plaintiffs from working therein.

The plaintiffs did not enter or desire to occupy the lands in the possession of the defendant for the purpose of mining, and they are not, therefore, entitled to claim any authority, right or privilege conferred or attempted to be conferred by the act of April 25, 1855. (Stats. 1855, p. 145.) If the plaintiffs are entitled to a judgment for damages, or to an injunction to restrain the commission of further injuries, their right depends upon the principles and rules of the common law, applicable to cases between adjoining landholders, where the one complains that he has sustained an injury by the acts of the other, done on his own land. The defendant had the undoubted right to cultivate and plant this tract of land; and, having planted it, there can be as little question that he had the same right to irrigate it for the purpose of maturing his crop. In irrigating his land the defendant is subject to the maxim *sic utere tuo ut alienum non lædas*. An action can not be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only for the injuries caused by his negligence or unskilfulness, or those wilfully inflicted in the exercise of his right of irrigating his land: Broom, Legal Max., 274. There is no pretense that any injury was willfully occasioned by the defendant, and there is no finding of negligence or unskilfulness on the part of the defendant.

The plaintiffs, therefore, are not entitled to judgment on the findings.

Judgment affirmed.

LEVARONI V. MILLER ET AL.

(34 California, 231. Supreme Court, 1867.)

Prior agricultural claim. The right of miners by a later appropriation can not be exercised to the damage of the ranch or ditch of an agricultural settler lying below.

Previous mining by strangers. When there is a question of priority between a mining claim and an agricultural claim, proof that the lands had been previously occupied for mining purposes by parties with whom or whose title the present claimants of the ground for mining purposes do not pretend to connect themselves, is of no avail to the present claimants.

Appeal from the District Court, Eleventh Judicial District, El Dorado County.

This was an action to restrain the defendants from injuring and destroying the garden, orchard and improvements of the plaintiff, and to recover damages in the sum of one hundred and fifty dollars, for injuries done prior to the commencement of the action. The complaint averred:

"That he (plaintiff) is the owner and in the possession of a certain ranch or piece of ground, situate, lying in the county of El Dorado and State aforesaid, and bounded, etc.

"Plaintiff avers that he is a rancher and cultivator of the soil; that he has on his said ranch a valuable garden and orchard; that there is a dwelling house and stable thereon, and was, a short time since, a good spring thereon, the water of which was used for drinking and culinary purposes; that he has also in said ranch a dam, used for the purpose of collecting water; that there is also upon said ranch a ditch connected with said dam, and which is supplied with water from said dam; that said dam and ditch are used by plaintiff to collect and supply water for irrigating the trees and vegetables on said ranch; that said garden and vegetables and trees growing thereon would be entirely useless and worthless without said water, and that said water could not be obtained or supplied without said dam and ditch.

"Plaintiff avers that he now has, and has had for some time

past, a great many vegetables and trees growing in said garden.

"Plaintiff further avers that a short time since, and while plaintiff was the owner of said land as aforesaid, the defendants commenced mining operations upon the ravine and hillside above the land aforesaid, south of and about one hundred yards from said garden; that said mining is carried on by the process known as sluicing and by means of using large quantities of water; that said defendants, by mining and using large quantities of water as aforesaid, have flooded plaintiff's premises aforesaid, injuring and filling up the dam aforesaid, so that it is worthless; cutting and injuring the ditch aforesaid; cutting and injuring the garden aforesaid, so as to destroy the vegetables and injure and damage the trees thereon.

"And plaintiff further avers that said defendants, by their acts aforesaid, have injured and destroyed said spring, and have rendered the same entirely worthless and useless to plaintiff.

"Plaintiff charges that the acts of defendants are unlawful, and if they are permitted to continue their acts aforesaid, great and irreparable injury will be done him. That they have already, by their acts aforesaid, done him injury and damage in the sum of one hundred and fifty dollars.

It further averred insolvency of defendants.

The prayer was for judgment \$150 in damages, and for an injunction against flowing water.

The answer traversed so much of the averments of the complaint as alleged the extent and irreparable nature of the injuries complained of and the existence of said spring; set up that defendants were miners, and owned mines of the value of one thousand dollars, situated at the points on the ravine and hillsides described in complaint; that said mines could only be worked by them in the manner complained of; that their said mines and their claim thereto were older than the said possessions and improvements of plaintiff; that the said possessions of plaintiff and their said mine were both part and parcel of the public mineral land of the United States, and that they were, and during all the time of the said alleged injuries had been, citizens of the United States.

The trial was before the court without a jury. The evidence, although on some points conflicting, tended generally

to prove the allegations of the complaint: that the possessions of both parties were on the public lands of the United States, and that defendants were citizens of the United States; but that defendants conducted their mining operations in the usual mode, and in a prudent manner, and that the injuries sustained by plaintiff resulted therefrom, and not from malicious or evil intent.

The court below rendered judgment for defendants, and plaintiff appealed from said judgment, and from an order denying a new trial, made by plaintiff on the grounds that said judgment was against the evidence and against law.

S. & GEO. E. WILLIAMS, for appellant.

J. G. McCALLUM and F. A. HORNBLOWER, for respondents.

By the Court, SANDERSON, J.

The judge below made no findings of the facts or conclusions of law, and it is therefore impossible for us to say from the record what he considered the facts or the law to be, except by inference from the grounds of the motion for a new trial. If, as they would seem to indicate, the court considered as a matter of fact that the plaintiff's homestead and improvements were established prior to the vesting of any right to mine in the ravine above in the defendants, and that the premises of the plaintiff were in fact damaged by the water turned into the ravine by the defendants and used by them in mining, yet as matter of law the right to mine is so far paramount to the right to inhabit and cultivate that the possessor of the former may destroy the latter right, notwithstanding it may be the older, if he finds it necessary or convenient for his purposes to do so, the court erred. That the right of the plaintiff to inhabit and cultivate his premises was older than the right of the defendants to mine in the ravine above, and their claim of right to run the water and tailings through the plaintiff's premises: does not seem to admit of doubt. The evidence seems to be very clear upon that point. The defendants only date their right to mine as far back as 1865, while the deed of the plaintiff under which he entered bears date in 1863. True, it was shown

that mining had been carried on by various parties at different times prior to 1865, or even 1863, but the defendants in no way connected themselves with those parties, and can not therefore date their right back of their own entry. The right of the defendants to mine in the ravine above the plaintiff's premises must be exercised in such a manner as not to damage the prior right of the plaintiff to inhabit and cultivate his premises. So, if the plaintiff's dam across the ravine antedates the mining right of the defendants, the latter must pay it the same respect, for it is appurtenant to the plaintiff's premises. So of the spring, if spring there was; but damages for the destruction of the spring would depend very much upon the question whether there is other water sufficient for domestic purposes equally convenient and pure.

Order denying a new trial reversed and new trial granted.

COURCHAINÉ V. THE BULLION MINING CO.

(4 Nevada, 369. Supreme Court, 1868.)

¹ A constructive possession is sufficient to maintain trespass.

Possession good against wrongdoer. Actual possession of real estate, even though wrongful, is sufficient to support an action of trespass *quare clausum fregit* against a mere stranger or intruder, but not against the rightful owner.

Receiver's receipt as evidence—Relation—Town site title against mining location. In an action of trespass brought by the plaintiff as claimant of a certain town lot, against the defendant, using the same premises as a dump and as a part of his location of a ledge, where the plaintiff had, after the trespass, obtained a receiver's receipt from the land office for the price of certain land pre-empted, including the premises: *Held*, that such receiver's receipt related back to the time of filing the declaratory statement, and should have been received as evidence, although the trespass had been committed before the issue of such receiver's receipt.

² **Possession yields to title—Paramount proprietor.** As between claimants, neither of whom derain a legal title from the United States, priority of possession must prevail; but, where one party holds a title from the paramount proprietor, it must prevail against a title which has never been recognized by a grant of any kind.

¹ *Grady v. Early*, 12 M. R. 104; *Roberts v. Wilson*, 4 M. R. 498.

² *Erhardt v. Boaro*, 113 U. S. 527.

Implications based on land office action. The decision of the register and receiver of the United States land office in favor of an applicant for pre-emption, is evidence not only that such person is entitled to a patent, but that he has settled upon and improved the land, and is an acknowledgment that his settlement and possession are lawful, and in accordance with the will of the government.

Land office adjudications. Although the decision of the register and receiver is not a judicial decision, and although liable to reversal by the commissioner of the general land office, it is evidence of the facts upon which it is supposed to be based, until actually reversed.

Miners need of lot—A question of fact. Whether a town lot included within the boundaries of a mining claim is so necessary to the mine owner in the working of his mine as to make his right to the lot, under the act of Congress of July 1, 1864, superior to that of an earlier pre-emptor of the lot, is a question for the jury.

Appeal from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

The original judgment was rendered while the Hon. Caleb Burbank was the judge of the court, and the new trial granted by his successor.

WILLIAMS & BIXLER, for appellant.

ALDRICH & DE LONG, for respondent.

By the Court, LEWIS, J.

The plaintiff, who is an occupant of certain lots in the city of Gold Hill, brings this action against the defendant to recover \$500, in which sum he claims to have been damaged by reason of the deposit upon his premises of large quantities of rock, dirt and refuse ore. The complaint also contains allegations upon which an injunction is sought to restrain the defendant, its agents, servants, and employes, from repeating or continuing the trespass complained of. It is admitted by the defendant that the plaintiff was in the actual possession of the two dwelling-houses on the premises in question at the time of the alleged trespass; but it justifies the acts complained of by a claim of superior title and right of possession in itself. The evidence adduced at the trial developed the

fact that the defendant's grantors located a certain ledge, together with the land occupied by the plaintiff, some time in the year 1859, and that the plaintiff made no location until some two years later. Courchaine had taken steps to acquire title from the general government, and at the trial offered to prove that he had filed his declaratory statement, giving notice of his intention to pre-empt the premises; that the register and receiver had rendered a decision in favor of his right, accepted of him the government price for the same, and given the ordinary receipt therefor. The court below refused to admit this evidence, and the usual exception was taken by counsel for the plaintiff. The verdict resulted in favor of the defendant, but believing that he had erred in rejecting proof of the decision of the local land officers, the judge below set aside the judgment, and directed a new trial. From this decision of the court the defendant appeals.

If it were error to rule out the decision of the land officers, or if any other material error were committed at the trial prejudicial to the plaintiff, it was clearly the duty of the court to set aside the verdict. Whether that decision should have been admitted is the principal question discussed by counsel, and the only one which it is necessary for this court to consider.

To maintain an action of trespass *quare clausum fregit*, it was formerly necessary for the plaintiff to establish an actual possession of the *locus in quo* in himself, but under the more modern holding, it seems that a constructive possession is sufficient. But a possession, whether actual or constructive, which is not rightful as against the defendant, is not available to the plaintiff; hence a superior right of possession in the defendant is always a sufficient answer to any action of trespass brought against him. Actual possession, although it be wrongful, is sufficient to support the action against a mere stranger or intruder, who has not the right of possession in himself, nor authority from the rightful owner. In such case the plaintiff's actual possession is rightful as against all mere intruders who have no color of right. His possession gives him as good right to maintain trespass against such, as the absolute title of property, coupled with the possession, could give him. But when the defendant shows that he is entitled

to the possession of the premises by reason of a superior title, he shows that the plaintiff has no right of action. It is therefore necessary for the plaintiff not only to show possession in himself, but it is indispensable that such possession be rightful as against the defendant.

In this case, the plaintiff, after showing he was in the actual possession of the premises at the time of the trespass, offered in evidence the decision of the local land officers, for the purpose of showing that his right to the possession was superior to that of the defendant, which claimed title simply through priority of location. If that decision confers a right of possession upon the plaintiff, the proof offered should have been admitted. Our conclusion is that it does. The public land is absolutely at the disposal of the federal government. Although individuals may settle upon and occupy portions of it, no title is acquired thereby which will be available against the primary right of the government. As between each other, settlers may acquire rights, which the courts will maintain and enforce. Thus the first possessor is always deemed to have the best right, and by establishing priority of possession, he is allowed to recover in ejectment; and in fact he is treated as the absolute owner of the land occupied by him. But all rights so acquired are subject to the paramount title of the government. Occupation and priority of possession are utterly worthless when opposed to a title or right of possession expressly conferred by the proper federal authorities. As between persons none of whom claim title from the government, nor can show a right of possession recognized by it, priority of possession must prevail. When, however, the government has declared, or by its proper tribunals decided, that a particular person is entitled to the possession, such declaration or decision, in the absence of fraud, is high evidence of his right to such possession; certainly superior to that which is acquired simply by priority of possession, unaccompanied with any recognition from the government.

The paramount proprietor of the soil, having an unrestricted right of disposition, has established certain regulations, by which persons producing the requisite proof are entitled to purchase a limited amount, at a given price per acre. Officers are appointed to take that proof, to determine from it whether

the applicant is entitled to purchase, or, where there is a contest, to decide which has the better right, and to receive the purchase money from him who in their judgment is entitled to the patent. Nor can such decision be legally rendered in favor of any person who does not show himself entitled to the possession at the time he makes application to pre-empt, for only those who are occupants of and have made improvements upon public land have the right to purchase the same as pre-emptors. The decision of the proper officers is therefore evidence not only of the fact that he in whose favor it is rendered is entitled to the patent, but also that he has settled upon and improved the premises claimed by him, and is certainly a direct acknowledgment that such settlement and possession is lawful and in accordance with the will of the general government. The register and receiver of the local land office are the officers appointed by the government to take the proof, decide upon the merits of all applications, and to receive the purchase money from the successful party. The law requires the proof in all cases to be made to their satisfaction. Where the proof is so made, their decision rendered, and the purchase money paid, how can it be said that such decision is not evidence of right of possession in him in whose favor it is given? It is a decision made by officers appointed by the government to determine such rights. Their decision is the decision of the government itself, and should therefore be accepted as evidence of superior right. The conclusion arrived at by the land officers, although not strictly a judicial decision, bears nevertheless a strong analogy to it, and it seems to us should be received as evidence of the right to the possession, and indeed of all the facts which it is necessary for the pre-emptor to prove before the land officers.

It is true the commissioner of the general land office has a supervisory control over the action of the local officers, and the power to reverse their decisions; but the bare possibility of a reversal should not destroy its effect as evidence until so reversed; therefore it ought to be received as proof of the right of possession.

But it is claimed, because the purchase money was not paid until some time after the commission of the trespass complained of, the title or right of possession acquired by the pro-

ceedings in the land office is not available to the plaintiff in this action. If, as argued by counsel, the right of the pre-emptor dates only from the time the receiver's receipt for the purchase money is issued, the decision of the land officers would in this case be inadmissible, for that title or right of possession only is available which existed at the time of the trespass. But in our judgment the decision of that officer is a confirmation by the government of all acts done by the pre-emptor toward acquiring title, and a recognition that his possession from the time he took the first step to obtain title was rightful and agreeable to the laws enacted by Congress. It has been held that the legal title acquired by the patent relates back to the time when the declaratory statement was filed. Why should not the rights conferred by the decision also relate back to the same time? A person can only be permitted to pre-empt who shows that he was an occupant at the time he filed his declaratory statement; the decision of the officers in his favor is evidence of his occupation at that time, and also that he had the best right to the possession, otherwise it is to be presumed the decision would be adverse to his right to pre-empt. The decision of the local officers, it seems to us, should be evidence of all the facts necessary to support such decision. Possession, or a superior right of possession at the time of filing the declaratory statement, is the necessary result of the facts required to be proved; the decision should therefore be evidence of such possession. We could readily agree with counsel for appellant that the mere certificate of the register, and receiver's receipt, would tend to establish nothing but the facts that a declaratory statement had been filed by the plaintiff, and that he had paid a certain sum of money for the premises to the person acknowledging its receipt; and so, without the decision of the land officers, these papers would in no wise tend to establish title or right of possession. But it appears by the record that the plaintiff offered to show that the land officers had rendered a decision in favor of his right to pre-empt the lots in question, and that the money paid by him and evidenced by the receipt was the purchase money paid to the government through the receiver. Indeed, it appears that the entire proceedings had in the land office were offered in evidence and rejected.

Nor are we able to see how the act of Congress referred to can help the defendant, that act declaring "that where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and a necessary use thereof."

Although this law seems to make the lot owner's title subordinate to the miner's right, whenever the use of the lot becomes necessary to enable the latter to work the mine, still the question as to whether such necessity exists or not in any particular case is to be determined by the jury. If it be found that the necessity does not exist, then the claimant of the lot will be entitled to recover for any injury suffered by him, if he has the better title. But if he be not allowed to establish his title or right of possession in an action against a miner who trespasses upon his premises, he would generally have no remedy, although he might have a perfect title, and no necessity such as that mentioned in the law exists in favor of the trespasser. It is necessary, therefore, in cases of this kind, where the defendant seeks to defeat the plaintiff's action by a claim of superior title and right of possession, that the plaintiff be allowed to fortify his possession by proof of any title or right which may in anywise tend to show that his possession is rightful as against the defendant. We conclude that the evidence offered should have been admitted. As it was ruled out, the new trial was properly granted.

The order must be affirmed.

BEATTY, C. J., did not participate in the foregoing decision.

HUGHES V. DEVLIN.

(23 California, 501. Supreme Court, 1863.)

Vested rights of mining claimants. Persons claiming and in the possession of mining claims upon the public lands of the United States, are as between themselves, and all other persons except the United States owners of the same, having a vested right of property founded on their possession and appropriation.

Co-tenants may part the mine. When a mining claim upon the public lands is claimed and possessed by several as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants the same as other real property.

Partnership no bar to partition. The mere fact that a claim is owned and worked by several persons as partners, is no valid objection to a partition of the same between the owners, where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership.

The material allegations in a complaint for partition of real property which are not denied by the answer, are deemed admitted for the purposes of the trial.

Where a sale and division, not a partition, is had, the statute does not require referees.

Appeal from the District Court, Ninth Judicial District, Shasta County.

The complaint averred that plaintiff and defendant were, and for a long time had been, tenants in common, owners and holders of certain mining claims, and a water ditch, (describing the same,) and that the plaintiff was the owner and holder of the undivided two thirds part, and the defendant of the undivided one third part of said property. The complaint further averred that plaintiff was desirous of having, and demanded, partition of said property, and every parcel thereof, according to the respective rights of the parties in interest; and that on the hearing of the cause, plaintiff would show that the property, from its nature and peculiar character, could not be divided without great prejudice to the rights and interests of the respective owners.

The following is a copy of all the material portions of the answer:

"The defendant admits that he has and holds a possessory and usufructuary interest of the one third part or share of all and each and every piece and parcel of the estate and property named and described in the complaint; but this defendant denies that he has or holds an estate of inheritance in the said property, or any part thereof, and avers that the said plaintiff has not, and that he never had or held an estate of inheritance in the said property, or in any part or parcel of the same; but, on the contrary thereof, this defendant alleges that the

mining grounds in the said complaint described, are of and belong to the public lands and domain of the United States ; and this defendant says, that neither himself nor the said plaintiff has or holds any right or title under the United States or any person, and that neither this defendant nor the plaintiff has, holds, or possesses the said property, or any part thereof, by any right or tenure which gives them, or either of them, an estate of inheritance therein.

And the defendant further shows that the said plaintiff and this defendant are partners in the business of mining and that they are carrying on the business of mining with and upon the said mining grounds, and by means of the said ditch, and the waters therein flowing ; and that the said ground, claims, ditch and waters constitute the capital stock and means upon and by means of which the said copartnership business is carried on and conducted to the great benefit and advantage of the said plaintiff and defendant.

The plaintiff demurred to the answer ; the court sustained the demurrer ; defendant declined to amend ; and the court without hearing any evidence, gave plaintiff judgment in accordance with the prayer of his complaint.

Defendant appealed.

ROBINSON & McCONNELL, for appellant.

R. T. SPRAGUE, for respondent.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action for a partition of a mining claim and water ditch connected therewith, the plaintiff claiming an undivided two thirds, and the defendant the undivided one third thereof. The two hundred and sixty-fourth section of the Practice Act provides that "when several persons hold and are in possession of real property, as joint tenants, or as tenants in common, in which one or more of them have an estate of inheritance, or for life, or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein ; and for a sale of such property, or a part of it, if it

appear that a partition can not be made without great prejudice to the owners." The action was brought under this section of the statute.

The defendant contends that the interest of miners in mining claims and ditch property upon the public lands, is not an estate of inheritance, or any of the other kinds of real estate mentioned in the statute; and therefore the same are not liable to be partitioned between the owners under the act. In this he is clearly in error. In *Merritt v. Judd*, 14 Cal. 64, this court say, in commenting on the Law of Fixtures: "From an early period of our State jurisprudence, we have regarded these claims to public mineral lands as titles. They are so practically. Our courts have given them the recognition of legal estates of freehold, and so, to all practical purposes—if we except some doctrine of abandonment, not, perhaps, applicable to such estates—unquestionably they are, and we think it would not be in harmony with this general judicial system, to deny to them the incidents of freehold estates in respect to this matter." So, too, they have been held to be "real property," respecting which a suit will lie under the two hundred and fifty-fourth section of the Practice Act, against a person claiming an adverse "estate or interest therein." *Merced M. Co. v. Fremont*, 7 Cal. 319. They are held to be real estate within the act relating to the place of trial of civil actions: *Watts v. White*, 13 Cal. 324. So, too, they are held liable to levy and sale on execution, like other real estate: *McKeon v. Bisbee*, 9 Cal. 142.

The ownership of a right to a mine, with the right to work the same, situated on land belonging to another, is a very common interest in mining countries. It has been held to be such an interest as would descend to the heirs of an owner. The mere right to work such mines is held to be an incorporeal hereditament in the land of other persons. But in such cases it is held that it is indivisible, because a division of the right would create new rights, and would prejudice the owner of the soil; and it has been therefore held that the coparceners must work the mines jointly with one stock, or each enjoy the right at successive periods of time: *Bainbridge on Mines*, 115, 116. But a different rule prevails where a distinct right of property in mines descends in co-

parcenary; and the coparceners in such case are entitled to a partition, as their rights would not thereby interfere with the property of others. They are seized, not of a bare right, but of an estate in fee, divisible in its nature: Id. 116. And the same rules apply to joint tenants and tenants in common of mines: Id. 117; Collier on Mines, Secs. 5, 12; Rockwell on Mines, Secs. 47-49. The distinction between the right to mine in the land of another and a distinct right of property in a mine, as to this right of partition, has no application to the public mineral lands in this State. Although the ultimate title in fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions and all rights, interests, and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons but the United States, as the owners of the land and the mines therein; and as such, where the land or the mine is claimed by several, as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants, the same as other real property.

The judgment is therefore affirmed.

On petition for rehearing, CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

It is urged in the petition that the property in controversy being used as partnership property, an action for a partition will not lie, and that a suit in equity must be brought to dissolve the partnership, and for an account of the partnership business. It does not appear in this case that any suit in equity is necessary to settle and adjust the business of the partnership. The mere fact that real estate, owned by persons as tenants in common, or even as partners, is used in a partnership business, affords no valid objection to an action to partition the same between the owners. The property was of such a character, and the owners had such an interest therein, as afforded a proper ground for an action for a partition, as has been shown by the previous opinion of this

court; and as the answer did not deny any of the allegations of the complaint, but merely set up the facts upon which the claim that a partition would not lie was founded, the demurrer to the answer was properly sustained.

It is objected that no evidence or proof was offered to show that the property was not capable of being partitioned without great prejudice to the owners, to authorize the court to order a sale. The fact was averred in the complaint, and was not denied by the answer, and it was therefore properly deemed admitted, like any other material fact affecting the rights of the parties, or the form of the remedy to which they might be entitled. The terms of the two hundred and seventy-fifth section of the Practice Act are a little peculiar upon this subject, but it does not vary the rule laid down in other sections, as to what facts are to be deemed admitted. No objection of this kind was made in the court below; and even if such proof were necessary, it may properly be deemed to have been waived under the circumstances, the defendants evidently relying upon their answer being a sufficient defense to the action. The same remarks apply to the objection that there was no proof of the title to the premises. The title and ownership was averred in the complaint, and not denied in the answer, and no objection of this kind was raised in the court below. If it had been, and the court had ruled that proof was not necessary, then such ruling might have been reviewed by this court. But the objection should not be raised here for the first time.

The court appointed a referee to make sale of the property in accordance with the decree, to which no objection appears to have been made in the court below; but it is now contended that the court should have appointed three instead of one. Sec. 275 of the Practice Act provides, that if a sale is not directed to be made the court shall order a partition, and shall "appoint three referees therefor." This does not apply to a case like the present, where a sale, and not a partition is ordered; and such sale can be as well conducted by one as three referees. This objection is not, therefore, well taken.

The rehearing is denied.

MAINE BOYS' TUNNEL CO. V. BOSTON TUNNEL CO.

(37 California, 41. Supreme Court, 1869.)

New trial, where verdict is against the evidence. This court, on review of the proper motion made in the court below and there denied, will order a new trial where the evidence given at the former trial was, without substantial conflict, opposed to the verdict.

Where two claims overlapped and plaintiff's only possession of the disputed gore of land was a shaft sunk several years prior to the suit, the plaintiff, in trespass, asked the following instruction: "If the jury believe from the evidence that plaintiffs, * * * more than five years prior to the commencement of this suit, in good faith and under a claim of right, entered into the possession of said disputed ground, and have continued in possession thereof, and expended labor thereon, (with the knowledge of defendants, * * * they making no objections thereto,) and that defendants have not forbidden plaintiffs possession so acquired, then the plaintiff is entitled to a verdict." *Held*, that the instruction failed to state the essentials of estoppel *in pais*, and was not otherwise relevant.

Title by the Statute of Limitations is not available to a defendant failing to plead the same.

Actual possession on opposite side of disputed gore. Where the ground in dispute was a gore of land, practically unoccupied by either party but each party working on the undisputed ground on either side, it was *held*, that the following instruction: "Where two mining companies take up adjoining claims, and the one last taken up overlaps the other, and neither company is working that portion of the claim which overlaps the other, but are working in different portions of their respective claims, the fact that the locators of the last claim located have been in possession of their claim for five years, does not divest the owners of the first claim of the right to their claim to the extent of the original boundaries, and such a possession by the locators of the last claim located is not adverse to the possession of those who located the first claim"—correctly declared the law, and should have been given.

Appeal from the District Court, Fifth Judicial District, Tuolumne County.

The following are the material portions of plaintiff's complaint, to wit:

"And the plaintiffs aver that they are and have been a corporation formed under the laws of this State, doing business in said county (Tuolumne) since the 3d day of September, A. D. 1858; and that the said defendant, Boston Tunnel Company, is a corporation, formed under the laws of this State, and do-

ing business in said county since the 19th day of June, A. D. 1858.

“And the said plaintiffs aver that since the 18th day of January, A. D. 1855, they and those under whom they claim have been the owners of, and except as hereinafter set forth and complained against, entitled to and been in the quiet and peaceable possession of the following described piece of mining ground, being situated on Table Mountain, near Scraperville or Jeffersonville: Commencing at a tree—the corner of the Welsh Boys’ claim—said tree being the southwest corner of plaintiffs’ ground; thence along the Welsh Boys’ line across the mountain to the east side thereof; thence along the east side of said mountain in a north direction seventeen hundred feet to a pile of stones, the northeast corner of said claim; thence in a direct line across the mountain to its base, to an oak tree, the northwest corner; thence in a southwesterly direction down the mountain to the place of beginning.

“That plaintiffs, since the 3d day of September, 1858, have been the owners of said ground for mining purposes, and except as herein complained against, have been and still are entitled to the quiet and peaceable possession of said ground, without let or hindrance from any one. * * * And the said plaintiffs aver that the defendants are the owners of the mining claim immediately north of the boundary of plaintiffs’ claim.

“And the said plaintiffs aver that the defendants, since the 1st day of June, A. D. 1866, and on divers days from thence down to the present time, have wrongfully and unlawfully, and against the will of plaintiffs, entered in and upon plaintiffs’ said ground, by means of an underground tunnel, commencing on defendant’s ground, and have mined out a large portion of plaintiffs’ ground, and extracted the gold therefrom, amounting, as plaintiffs aver and charge, to the sum of, to wit, one thousand dollars. And the plaintiffs aver that said acts of defendants have been confined to two hundred and sixty feet off of the north portion of plaintiffs’ said claim. And the said plaintiffs aver that said defendants say and threaten that they will continue and mine out and extract the gold from said two hundred and sixty feet of said claim. Wherefore said plaintiffs pray judgment against said defendants for the damages so

as aforesaid sustained, to wit, for the sum of one thousand dollars, the value of the gold taken from said claim as aforesaid by defendants; and that a receiver be appointed to take charge of the gold which may be taken from said claim, or that portion thereof above described, pending this litigation, and that defendants be evicted therefrom. And plaintiffs pray such other relief as the matters of the case may demand."

The cause was tried before the court with a jury. The plaintiff had verdict and judgment. The defendant moved for a new trial on the grounds, among others, that the verdict was contrary to the evidence, and for errors in law occurring at the trial, and excepted to by the defendant. The court denied the motion, and the defendant appealed from the judgment and the order denying a new trial.

The other facts are stated in the opinion of the court.

CALEB DORSEY, for appellant.

H. P. BARBER, for respondent.

By the Court, SPRAGUE, J.

This is an action for an alleged trespass of defendant upon the mining claim of plaintiff.

The only controverted question of fact, upon the trial, seems to have been whether the *locus in quo* of the alleged trespass is within the boundaries of plaintiff's claim.

Upon a careful review of the whole testimony, we have not been able to discern any substantial conflict in the evidence tending to establish the following preliminary facts, upon which this ultimate fact depends.

Early in the month of January, 1855, defendant's grantors located, by marking out and establishing the four corners, and commenced work upon, a certain piece of mining ground, situate on Table Mountain, in Tuolumne county, and on the 29th of the same month caused a record of their location, with the metes and bounds thereof, to be made in the office of the recorder for the mining district in which the same was located. Subsequently, about the 15th of January, 1855, the grantors of plaintiff located mining grounds immediately south of the

defendant's claim, and between defendant's claim on the north and claims previously located on the south, known as the Scraperville or Welsh Boys' claims; and thereafter, on the 28th November, 1855, caused records of such location, with assumed metes and bounds thereof, to be made at the office of the recorder for the mining district.

There seems to have been no controversy at the trial as to the true southwest corner of defendant's and northwest corner of plaintiff's claims; this corner is admitted to be a white oak stump, which stump is the southwest corner of defendant's and northwest corner of plaintiff's claim.

About the 1st of January, 1855, defendant's grantors marked out the western line of their claim, and established and marked their northwest and southwest corners, the northwest corner being a large pine tree, and the southwest corner being a large white oak tree (now a stump). On the following day, or a few days thereafter, they marked out their south, east and north lines, and established their southeast and northeast corners, their northeast corner being a small pine tree, and their southeast corner being a mound of stones; the distance between defendant's northwest and southwest corners and between their northeast and southeast corners, as measured at the time, and as by them recorded on the 29th January, 1855, being three thousand feet.

The plaintiff's claim, subsequently located about the 15th January, 1855, was located between the defendant's claim on the north and the Scraperville or Welsh Boys' claim on the south, and was marked out by marking the northwest established corner of the Scraperville claim as their southwest corner, and the northeast corner of the Scraperville claim as their southeast corner, and marking the established southwest corner of defendant's claim as their northwest corner; and their northeast corner was intended to be made identical with the established southeast corner of defendant's claim; but not being able at the time to discover defendant's southeast corner, a notice was posted on a *nut pine* tree as plaintiff's northeast corner, stating that "that was the Maine Boys' claim, bounded on the south by the Scraperville and on the north by the Boston claim."

No other or different location of plaintiff's claim was ever

made or attempted, except that a month or two after this first location the party who made the same was shown the southeast corner of defendant's claim by defendant's company, the same being a pile of stones. He then made the same pile of stones plaintiff's northeast corner. But subsequently, in November, 1855, on making a record of its claim, plaintiff described its location by metes and bounds, without reference to any other claim, except the Welsh Boys' claim, and gave the distance from its southeast to its northeast corners, and from its northwest to its southwest corners, as one thousand seven hundred feet. The measurement of these lines was not made or attempted at the time the ground was located in January, 1855, nor does it appear that any measurement of these lines was made or attempted prior to the making of the record, or at any other time, until a short time before the commencement of this suit, except, in 1856, one Alfred Roberts, a member of plaintiff's company, measured the west and east lines of its claim, and found the west line to be from one thousand six hundred to one thousand eight hundred feet in length, and the east line to be five or six hundred feet in length.

The true location of the southeast corner of defendant's and northeast corner of plaintiff's claims appears to have been the only material point in controversy on the trial.

Witnesses, who made surveys of the respective claims a short time before the trial, testify to two piles of stones on the eastern brow of Table Mountain—one about six hundred and twenty-five feet north of the other. The plaintiff claims this north pile of stones as defendant's true southeast corner, and as its own true northeast corner; and defendant claims the south pile of stones as its own true southeast corner and plaintiff's true northeast corner. Starting from the oak stump on the west side of the mountain, which is agreed to be the true southwest corner of defendant's claim and the northwest corner of plaintiff's, and running a direct line from thence easterly to the most southerly pile of stones on the east brow of the mountain, claimed by defendant as its true southeast corner, the *locus in quo* of the alleged trespass is entirely within the limits of the defendant's claim; and by running a direct line easterly from the same oak stump to the northerly pile of stones on the east brow of the mountain, claimed by

plaintiff as its true northeast corner, the defendant has worked south of this line one hundred and seventy-seven feet; and if this be the true dividing line between plaintiff's and defendant's claims, defendant has trespassed upon plaintiff's claim to the extent of running a tunnel one hundred and seventy-seven feet upon and in its ground.

There is no positive evidence as to the precise time when or by whom either of the two piles of stones were erected on the east brow of the mountain, and there is no evidence tending to establish that plaintiff, or those under whom it claims, ever erected either of those piles of stones, or ever established any northeast corner of its claim, other than the *not pine* hereinbefore stated, and about two months thereafter making the pile of stones, pointed out by the "Boston Boys" as their southeast corner, plaintiff's northeast corner.

There is no conflict in the evidence tending to establish the fact that the southerly pile of stones claimed by defendant as the southeast corner, is the identical pile of stones pointed out by the "Boston Boys" to the party locating the "Maine Boys" claim within two months after the first attempt at location of the same, as hereinbefore stated, and is the identical pile of stones which the same party then made the "Maine Boys'" northeast corner.

Witness Atherton, called by defendant, is the only witness who testifies as to the time and manner of locating plaintiff's claim. He says: "I know plaintiff's and defendant's claims. I located plaintiff's claim about the middle of January, 1855. I found a vacant piece of ground between the Boston and Scraperville, and went to find the southwest corner of Boston, and found it on a large white oak tree, spotted and written on it: 'Southwest corner of Boston company.' I wrote on the same tree, with pencil, 'Northwest corner of Maine Boys' claim.' I then went and found northwest corner of Scraperville, and marked it, 'Southwest corner of Maine Boys' claim.' I then crossed over on the east side of the mountain, and found the northeast corner of the Scraperville, and marked it with pencil, 'Southeast corner of Maine Boys' claim.' I then went up to find the southeast corner of Boston company's claim; did not find it, but wrote a notice and put it on a pine tree. The notice read, stating that was the Maine Boys' claim,

bounded on the south by the Scraperville, and on the north by the Boston claim; I put it on a *nut pine*; the tree is there yet. I calculated I was near the southeast corner of the Boston claim. I wanted to get as near the line as I could. I did not intend to get over the line. * * * The Boston company had been at work in their claim when I marked the Maine Boys' claims. I should judge they had been at work a week or so by the looks of the work. It had been located prior to the passage of the laws at Darow's. The southeast corner of the Boston claim was pointed out to me by the Boston company a month or two after I took up the Maine Boys' claim, and I then made it Maine Boys' northeast corner. I pointed out the same rock pile to Wilson the other day. I became an owner in the Boston company in December, 1855, and remained a member of the Boston company seven years. I was a member of the Maine Boys' company three or four years. There was nothing done in marking out lines in Maine Boys' except what I did. While I was a member of the Maine Boys' company the recognized line was as I have stated. The oak tree on which I found the notice was always considered the dividing line, and the rock pile pointed out to me by the Boston company as their southeast corner. There never was any trouble about the claim till Alfred Roberts measured the front, (the Mormon Creek side,) and found we had one thousand six hundred to one thousand eight hundred feet; and he then went over and measured the east side of the claim and found there was but five or six hundred feet. He thought we ought to have more ground; that was the first time there was any dispute about the lines. This was some time in 1856. I bought into the Boston company before the commencement of the suit with the Twist Ranch company, December 17, 1855. At the time I bought into the Boston company the entire bounds were pointed out to me by Dr. Sherburne, and Bucket, the man I bought out. They pointed out the rock pile I pointed out to Wilson the other day as the southeast corner of the Boston claim, the white oak tree as the southwest corner, the large yellow pine standing a little below the ditch as the northwest corner, and a small pine standing back of the buildings on the Rose-dale Ranch as the northeast corner. There was a notice, made from candle paper, nailed on the northeast corner; the tree

is not standing now. I saw the stump recently, and a piece of the trunk is there with the nails in it, and pieces of candle paper under the heads of the nails. The tree was cut some time ago, and the trunk hung to the stump. I saw it the day of the survey by Cooper, and the day I pointed out the southerly corner to Mr. Wilson. The corners I pointed out to him are the same ones pointed out to me by Sherburne and Bucket, and the same ones I located. * * * Roberts came in shortly after we took up the claims."

W. S. Cooper, a witness called by defendant, testified as follows: "I am county surveyor. I surveyed defendant's claim, July 15, 1867; began at the northeast corner pointed out by F. B. Doten; it is a pine stump, about a foot in diameter; ran north fifty-three degrees thirty seconds west one thousand two hundred and fifty-seven feet to a large pine stump; thence south seventeen degrees west to a large oak stump two thousand nine hundred and seventy-five feet. * * * The oak stump was pointed out to me as the southwest corner by Mr. Atherton. I then ran south seventy-three degrees east two thousand eight hundred feet to a rock mound, southeast corner. This mound was pointed out to me by Atherton as the southeast corner. I then ran north twelve degrees west three thousand feet to the place of beginning. I had not seen the records testified to by Darow, but had seen a copy. The corners correspond exactly. The distances are not exact, but very near. The easterly line in the record corresponds exactly with my measurement. The westerly line is recorded as three thousand feet; I make it two thousand nine hundred and seventy-five feet. * * * The courses I have given are the magnetic courses. * * * The entire underground works of defendant are within the limits I have described as having surveyed."

Thomas Morris, a witness called for the defendant, testified as follows: "I have been an owner in Boston Company seven years this fall; during all that time have known the southwest, the southeast and northeast corners. I saw them pointed out to Cooper, and pointed them out myself. Atherton showed them to me. * * * The corners Atherton pointed out to me seven years ago are the same that Cooper surveyed to."

There is no testimony in the record conflicting with or tending to impeach or rebut the foregoing testimony of Atherton, Cooper, and Morris, but much corroborative thereof, and all tends clearly to establish that the southerly stone pile is the true southeast corner of defendant's and northeast corner of plaintiff's claims, and, thus established, the *locus in quo* of the alleged trespass of defendant is entirely within the legitimate boundaries of its own claim, as originally located, and not on or within the plaintiff's claim; hence the verdict of the jury, "establishing the line as claimed by plaintiff," is not only unsupported by, but manifestly against the evidence, as found in the record. We are at a loss to account for the verdict as rendered upon the evidence, except upon the theory that the jury were controlled in their action, not by the evidence upon the point as to where the original true southeast corner and southern boundary of the defendant's claim were, but by an instruction given by the court at the request of plaintiff, and other evidence tending to establish that plaintiff, some time in the year 1856 or 1857, sunk a shaft within the boundaries of defendant's claim, without objection on the part of defendant, and claimed the disputed ground as within its boundaries. This instruction given by the court, at request of plaintiff, is as follows: "If the jury believe, from the evidence, that plaintiff, or those under whom it claims, more than five years prior to the commencement of this suit, in good faith, and under a claim of right, entered into the possession of said disputed ground, and have continued in possession thereof, and have expended labor thereon (with the knowledge of defendant or those under whom it claims, it making no objection thereto) and that the defendant has not forbidden its possession so acquired, then the plaintiff is entitled to a verdict."

As an abstract proposition, this instruction, as given, can not be sustained. It fails to state the essential elements of an estoppel *in pais*: *Boggs v. Merced Mining Co.*, 14 Cal. 367, 368; *Davis v. Davis*, 26 Cal. 39-42.

Again, there was no sufficient evidence in this case to point such an instruction. The plaintiff claims the ground in controversy by virtue of its prior location and possession. The evidence establishes that the defendant located and had the

possession of this ground before plaintiff located its claim adjoining thereto. The evidence further shows, upon the point of actual *possessio pedis* of the disputed ground, that the defendant was working on or very near, claiming the same as within its boundaries, in 1856 or 1857; that while defendant was so working on or very near this disputed ground, both plaintiff and defendant claimed the same, and plaintiff, while defendant was so working, sunk a shaft on the ground. The sinking of this shaft is the only work plaintiff is shown ever to have performed upon the disputed ground, and while sinking this shaft, plaintiff was informed by defendant that it was working on defendant's ground. The evidence tends strongly to establish that the boundary line between plaintiff and defendant has been a question of dispute between the parties since 1856; hence the instruction asked by defendant and refused by the court was pertinent and proper, after the instruction given at request of plaintiff, and should have been given.

Judgment and order reversed and cause remanded for new trial, and remittitur directed to issue forthwith.

SAWYER, C. J., concurring specially.

I do not see how the jury could have found the verdict they did unless they were misled by the instruction given at the plaintiff's request. The instruction is not admissible with reference to the Statute of Limitations; if for no other reason, because the plaintiff does not allege title under that statute. The allegations of the complaint are insufficient to show an adverse possession. Nor is the evidence such as to justify the instruction upon a question of estoppel, if the instruction was itself properly framed in that aspect. In either view it should have been refused. The instruction asked by defendant was, I think, properly refused. It does not appear to me to be relevant to the case as presented by the evidence, either alone or in connection with the instruction erroneously given. I concur in the judgment on the grounds indicated.

CAMPBELL ET AL. V. RANKIN.

(99 United States, 261. Supreme Court, 1878.)

Possession as evidence of title against trespasser. In actions of ejectment, or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction is *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient.

Parol evidence as to issues decided on first trial. A judgment is conclusive of every issue decided in the suit, and in a second suit between the same parties, it can be shown by parol evidence what was tried in the first, whenever it becomes necessary to do so.

Affidavit for continuance used upon trial. An affidavit for continuance is not to be treated by the court as a part of the record, and can only be used upon the trial, if at all, when introduced by one of the parties for some legitimate purpose.

Local records as evidence. While the record of a mining district is the best evidence of the rules and customs governing its mining interests, it is not the best or only evidence of the priority or extent of a party's actual possession.

Act of May 10, 1872, as affecting proof of record and of possession. The act of Congress of May 10, 1872, § 5, gives no greater effect to the record of a mining claim than is given to the registration laws of the States, and they have never been held to exclude parol proof of actual possession, and of its extent as *prima facie* evidence of title; nor will the want of such record exclude such proof.

Error to the Supreme Court of the Territory of Montana.

The facts are stated in the opinion of the court.

J. HUBLEY ASHTON and NATHANIEL WILSON, for the plaintiffs in error.

RICHARD T. MERRICK, *contra*.

MILLER, Justice, delivered the opinion of the court.

The declaration avers that plaintiffs below, who are also plaintiffs in error, were the owners of a mining claim in Meagher county, known as claim No. 2, below discovery, in Green Horn Gulch, and that defendant wrongfully entered

¹ Reversing *Same v. Same*, 2 Mont. 363.

upon and took possession of a portion of said claim, and took and carried away large quantities of gold-bearing earth and gold dust, the property of plaintiffs, of the value of \$15,000.

The answer amounts to a general denial of all the averments of the complaint.

Bills of exception taken on the trial show that plaintiffs offered in evidence the record of a judgment in the same court, in which the defendant in this suit was plaintiff, and the present plaintiffs and those under whom they claim were defendants, which was an action for trespass, wherein the same question of conflicting interference of the two mining claims was in issue, and the verdict and judgment were for plaintiffs in this suit. The admission of this record was objected to, and the court sustained the objection.

Plaintiffs then offered to prove that they had been in actual possession of claim No. 2, in Green Horn Gulch for several years, and that defendant had admitted in conversation the existence of such a claim, and had conceded a dividing line between his claim and that of plaintiffs, which would give to the latter the ground in controversy. The court refused this also.

Plaintiffs then offered in evidence a deed from Harding & Wilson for claim No. 2, Green Horn Gulch, dated December, 1869, and proof of occupancy and use of it ever since. The court rejected this also. And having rejected all the evidence offered by plaintiffs, it directed the jury to find for defendant, and on that verdict rendered a judgment, which was affirmed on appeal by the Supreme Court of the Territory.

The record sufficiently shows that neither party to this suit had any legal title to the *locus in quo* from the United States, and that the controversy involves only such possessory right as the act of Congress recognizes in the locator and occupant of a mining privilege.

Since this right of possession was the matter to be decided by the jury, it is almost incomprehensible that proof of prior occupancy, and especially when accompanied by a deed showing color of right, should be rejected.

In actions of ejectment or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction has always been held *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient: 2 Greenl. Evid., Sec. 311.

If this be the law, when the right of recovery depends on the strict legal title in the plaintiff, how much more appropriate is it as evidence of the superior right of possession under the acts of Congress which respect such possession among miners.

If this plain principle of the common law needed support from adjudged cases, as applicable to the one before us, it may be found in the courts of California in *Attwood v. Fricot*, 17 Cal. 37, *English v. Johnson*, Id. 107, and *Hess v. Winder*, 30 Id. 355.

The court below erred, therefore, in rejecting this evidence of plaintiffs' prior possession.

Whatever may have been the opinion of other courts, it has been the doctrine of this court in regard to suits on contract ever since the case of the *Washington Steam Packet Co. v. Sickles*, 24 How. 333, and in regard to actions affecting real estate, since *Miles v. Caldwell*, 2 Wall. 35, that whenever the same question has been in issue and tried, and judgment rendered, it is conclusive of the issue so decided in any subsequent suit between the same parties; and also, that where, from the nature of the pleadings, it would be left in doubt on what precise issue the verdict or judgment was rendered, it is competent to ascertain this by parol evidence on the second trial. The latest expression of the doctrine is found in *Cromwell v. County of Sac*, 94 U. S. 351, and *Davis v. Brown*, Id. 423.

The rejection of the record of the suit of *Rankin v. Campbell and others* was in direct conflict with this doctrine. In that case Rankin had brought an action of the same character as the one he is now defending, against the parties who are now plaintiffs, and had a verdict and judgment against him. The record in that case, as in this, shows that one party claimed under mining claim No. 2, in Green Horn Gulch, and the other under mining claim No. 8, in Confederate Gulch. The issue in both cases was, to which claim did the disputed piece of mineral deposit belong; and if that issue was not clear, it was competent under the decisions we have cited, to show by parol proof that the controversy was over the same locality, and that the issue had therefore been decided against Rankin.

And this proof the plaintiffs offered, in connection with the record of the former suit. The exclusion of this evidence was error.

The principal ground on which the court rejected all this evidence, and all other evidence offered by the plaintiffs, is, that at the same term of the court, and before the trial, one of the plaintiffs, in support of an application for a continuance, made an affidavit, in which he stated that he expected to prove by an absent witness that he had destroyed the original record and laws of Green Horn Gulch, in which the plaintiffs' claim is located; that said records and laws established the size, lines, boundaries, and the location of claim No. 2 below discovery in said gulch, and that said records showed that the predecessors of the plaintiffs in interest possessed and occupied this claim, in accordance with the local rules.

This affidavit, made in support of an application for continuance, which was overruled, the judge, of his own motion, treated as part of the record and as before him on the trial, though not offered by either party; and as well as we can understand it, excluded all other evidence of the possession and location and validity of the plaintiffs' claim, because this lost record was the best evidence, and all other was secondary or inferior.

It is difficult to argue this proposition seriously. The affidavit was in no judicial sense before the court on the trial, and could only be used, if at all, when introduced by one of the parties for some legitimate purpose. If it had been so presented by the defendant, it plainly showed that this better evidence was destroyed and could not be produced, and was a sufficient foundation for the use of secondary evidence.

But the local record of a mining community, while it may be and probably is the best evidence of the rules and customs governing the community, and to some extent the distribution of mining rights, is not the best or the only evidence of priority or extent of actual possession. It may fix limits to individual acquisition, the terms and rules for acquiring and transferring mining rights, as the laws of the State do in regard to ordinary property; but such rules and customs no more determine who was the first locator or where he located, than any other competent evidence of that fact.

Whatever may be the effect given to the record of mining claims under section 5 of the act of Congress approved May 10, 1872 (17 Stat. 92), it certainly can not be greater than

that which is given to the registration laws of the States, and they have never been held to exclude parol proof of actual possession and the extent of that possession as *prima facie* evidence of title.

The Supreme Court of the Territory argue that the trial court can regulate the order of admission of evidence in a case, and because the plaintiffs did not introduce first of all proof of their mining records which were lost, nothing else could be introduced. For want of these, evidence of actual possession, of title deeds, of the location of the claim, and the record of the former suit determining the rights of the parties to the *locus in quo*, were all unavailing and inadmissible.

We know of no rule of law which justifies this action.

The judgment of the Supreme Court of Montana will be reversed, and the cause remanded to that court with directions to order a new trial; and it is

So ordered.

PHENIX MILL AND MINING CO. V. LAWRENCE ET AL.

(55 California 143. Supreme Court, 1880.)

Entry upon another's possession, when wrongful and when allowable-

A person who knows that a mining claim is in the actual possession of another can not honestly believe that it is vacant and subject to entry and re-location; an entry made under such circumstances can not be in good faith, unless upon some claim of legal right. Actual possession in another is *prima facie* evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right; but one who has a title and present right of possession, may always take peaceable possession of what he claims to be his own.

¹ **Entry upon possession with intent to initiate location.** Where, in an action for unlawful entry, the evidence showed that the defendant entered upon mining ground in the possession of the plaintiff without previous color of right, but under the claim that plaintiff's location was void, and with intent to re-locate, it was *held*: that a party can not enter for the purpose of obtaining title, but must have it before he enters;

¹ The cases do not squarely meet the contention in this appeal. According to the text, if there be a pretended claim in occupancy, how-

and the court refused to instruct the jury that if defendant entered upon the lands peaceably and in good faith, believing that they were open to location, the entry in such case was not unlawful.

General belief as evidence of abandonment. Upon the question of good faith in making an entry upon plaintiffs' mining claim, for the purpose of re-locating it: *Held*, that the court properly sustained an objection to the following question: "Do you know what the *general belief* was in reference to those mines, as to whether they were abandoned or not?"

Appeal from a judgment for the plaintiff, and from an order denying a new trial, in the County Court of San Bernardino County. WILLIS, J.

The facts are stated in the opinion.

A. B. HUNT, for appellants.

BYRON WATERS and H. M. WILLIS, for respondent.

McKEE, J.

The action was against the defendant for an alleged unlawful entry on the 13th of May, 1879, upon "those certain leads, lodes and mining property known as Beatrice No. 1, and Beatrice No. 2, situated at Ivanpah, Clark Mining District, San Bernardino County," of which, it was claimed, the plaintiffs had had peaceable possession until the day of the unlawful entry thereon by the defendants, and for more than five days before; and after their entry thereon the defendants refused on demand to restore the possession thereof to the plaintiffs.

The possession of the plaintiffs, the entry of defendants, and demand and refusal, are specifically denied; but in a further answer the defendants admit that they entered in good

ever void its location, no third party can come upon the ground for the purpose of initiating a valid location, and the claim could be held indefinitely, although no single requirement of the law were complied with.

To same effect as the text is the *North Noonday Case*, 9 M. R. 524. Possession is sufficient during period necessary to perfect location: *Erhardt v. Boaro*, 4 M. R. 432; 113 U. S. 527; *Crossman v. Pendery*, 4 M. R. 431. But discovery with possession is not valid against a subsequent peaceable location: *Horeswell v. Rinz*, 7 Pac. 197; *Gleeson v. Martin White Co.*, 9 M. R. 429. Possession is not equivalent to location: *Garfield Co. v. Hammer*, 8 Pac. 153.

faith upon the property, on the 13th of May, 1879, believing that the ground was vacant and subject to location, according to the laws of the United States and of Clark Mining District.

As to the possession of the plaintiffs, demand and refusal, and the entry by the defendants, the evidence was all one way. The defendants themselves, in their testimony, admit that the company had been in possession of the property since 1878, and that the company and its predecessor had expended in tunneling, timbering, and building railroad tracks, dumps and houses, and in cars and tools, several hundreds of thousands of dollars—probably, says the defendant Lawrence, half a million of dollars. In 1879 the company ceased work upon the mine for a while, but, during the suspension of work it kept men in general superintendence over the property, and the keys of the houses were in their possession. Both defendants lived near the mine; Lawrence had worked on it for two years for the Ivanpah company, of which the plaintiff is the successor; Peterson lived within two hundred yards of it, and, on the day of their entry, they knew that the mine was in charge of the men of the plaintiff, and that the keys of the houses were in their possession. The only issuable question was really the intention with which the defendants entered. They claimed in their answer that they entered in good faith, believing that the ground was vacant, and subject to location according to the mining laws. But a person who knows that a mining claim is in the actual possession of another can not honestly believe that it is vacant, and subject to entry and re-location; and the entry under such circumstances can not be made in good faith, unless it is made upon some right, or color of right, or claim of a legal right, to make the entry. Such a claim of right must exist before the entry, to constitute good faith in making the entry. If it does not exist, the entry is made without right or color of title, and is an entry in bad faith; for actual possession in another is *prima facie* evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right; but one who has a title and present right of possession may always take peaceable possession of what he claims to be his own. In *Townsend v. Little*, 45 Cal. 673, the defendant, who was a qualified pre-emptor, and had filed a declaratory statement of her inten-

tion to pre-empt a tract of land, which was shown to be part of the public lands of the United States, was allowed to introduce evidence of these things to show her belief of right and good faith in entering upon the land in dispute in that case. And in *Powell v. Lane*, 45 Cal. 677, the defendant was allowed to show his patent as evidence of good faith in entering upon the land. See, also, *Dennis v. Wood*, 48 Cal. 361; *Shelby v. Houston*, 38 Id. 422; *Randall v. Falkner*, 41 Id. 242.

But the defendants offered no evidence of right or title. They knew that the mine was in the possession of the plaintiff, and that half a million of dollars had been expended on it; and they admit that they entered upon it, not upon the faith of any title or right in themselves, but to take advantage of what they supposed to be a defect in the title of the plaintiff. For the defendant Lawrence, when asked if he believed that this mine was vacant land, answered as follows: "I did."

"Q. How did you believe it had become such?

"A. The reason I believed it was such, they can not hold more than one mine on a ledge; a company of men can not hold only one mine on a ledge; they have three locations on the same ledge.

"By the Court: Did you enter for the purpose of taking advantage of some defect you supposed there was in the title?

"A. Yes; and it did not belong to them; they could not hold it, and part of the company said it never belonged to them; they never disputed it.

"Q. Then your only claim was that they wasn't allowed by law to hold them—they wouldn't be allowed by law to hold them?

"A. Yes, sir.

"Q. You actually thought they had been holding them?

"A. I don't know as they held them; the McFarlanes held them.

"Q. Did you know that Billy McFarlane held them for this company?

"A. They had men there to work; I suppose they were working for the company.

"Q. Now, then, that was your idea as to how it was va-

cant land, that one company could not hold three claims on one ledge?

"A. Yes; and they had four.

"Q. And you thought they could not hold it; you thought they were yet trying to hold them?

"A. No, I did not. I had information that they had abandoned the whole work, and that the company had busted up.

"Q. Which did you rely upon? You tell us first one thing—that they could not hold four locations on the same ledge—now you tell us next that you believe the company had abandoned the mine. Now tell us which of these propositions you rely on?

"A. I rely on both of them.

"Q. Both of them?

"A. Certainly.

"Q. You relied on the company claiming more than they had a right to claim?

"A. Yes, sir."

It is apparent that the defendants, by their own testimony, did not enter upon the mine under any title or claim of right which they had to the mine. They entered only because they believed or suspected that the plaintiff's claim of title was defective. After their entry without right or color of title, they went through the forms of making a location, and posted a notice thereon, which they caused to be filed in the recorder's office of the district.

Upon this testimony it was not error for the court below to refuse to give to the jury the following instruction, at the request of the defendants, to wit: "If the jury believe that the defendants entered upon the mines peaceably and in good faith, believing that they were open to re-location, then the entry was not unlawful, and they are entitled to your verdict." The court had already correctly given them the law upon the subject, by telling them that if the defendants entered peaceably, in good faith, under claim or color of title, they were entitled to a verdict; and again if they entered under claim or color of right, peaceably and in good faith, believing themselves to be the true owners, they were entitled to a verdict. Nor did the court err in instructing the jury that a party can not enter for the purpose of obtaining title or color of right. He must

have it before he entered. This was correct, because, as we have already shown, title or color of right was necessary as a basis upon which they could found their good faith in making the entry. They could not enter without it for the purpose of acquiring it after entry.

Taken as a whole, the entire charge of the court fully and fairly submitted the questions involved in the case to the consideration of the jury, and we are not inclined to disturb the judgment, because some of the instructions which were given are subject to mere verbal criticism: *Brooks v. Crosby*, 22 Cal. 42.

It was also assigned as an error, that the court erred in sustaining an objection to the following question put to a witness: "Do you know what the *general belief* was in reference to those mines, as to whether they were abandoned or not?" The objection to the question was properly sustained. What was the belief of defendants was admissible upon the question of good faith in making their entry, but the general belief of the community was not an element of their conduct, or in the defense of the case before the court.

We see no errors in the proceedings which prejudiced the defendants. The verdict is fully sustained by the evidence.

Judgment and order affirmed.

THORNTON, J. and MYRICK, J., concurred in the judgment.

1. Occupation distinguished from possession: *Dalles City v. Missionary Society*, 6 Saw. 126; *Quicksilver Co. v. Hicks*, 11 M. R. 98.

2. Possession a sufficient title to maintain trover for ore: *Taylor v. Parry*, 1 Scott N. R. 576; 1 M. & G. 604; *Northam v. Bowden*, 15 M. R.

3. The possession of an employe is the possession of the owner, and is not notice of his equities against the owner: *Jenkins v. Redding*, 15 M. R.

4. Possession by an employe is sufficient to make his ouster the ouster of his employer under the forcible entry act: *Baker v. Dickson*, 62 Cal. 19.

5. Possession of public land carries with it all the incidents of ownership: *Crandall v. Woods*, 1 M. R. 604.

6. What constitutes possession is a question of law for the court: *Thisle v. Frostburg Co.*, 10 Md. 129.

7. Possession constitutes, of itself, title: *Mallett v. Uncle Sam Co.*, 1 M. R. 25. Possession, of itself, is property: *Brennan v. Gaston*, 7 M. R. 426.

8. Mining claims are held by possession regulated by usage: *Attwood v. Fricot*, 2 M. R. 305.

9. The actual possession of a miner is not restricted to his *possessio pedis*: *Id.*

10. The possession of one co-tenant is possession of all: *Colman v. Clements*, 5 M. R. 247.
11. The possession by all is the possession by each: *Patterson v. Keystone Co.*, 13 M. R. —.
12. Possession, as evidence of notice of title: *Fair v. Stevenot*, 11 M. R. 11; *Brophy Co. v. Brophy Co.*, 10 M. R. 601; *Sheets v. Allen*, 11 M. R. 16.
13. Actual possession of mining claim defined, instanced or illustrated: *Kelly v. Natoma Co.*, 1 M. R. 592; *Courtney v. Turner*, 12 Nev. 345; *Strepey v. Stark*, 7 Colo. 614.
14. A single co-tenant has the right to exclusive possession, as against strangers: *Melton v. Lambard*, 15 M. R. —; *Hopkins v. Noyes*, 4 Mont. 550; *Weese v. Barker*, 7 Colo. 178.
15. An owner in constructive possession may maintain trespass except as against a party in actual adverse possession: *Baker v. King*, 14 M. R. —; *Hugunin v. McCunniff*, 14 M. R. —.
16. Possession essential to maintain action to quiet title: *Pralus v. Jefferson Co.*, 12 M. R. 473.
17. Possession, consists in subjecting land to the will and dominion of the occupant: *Courtney v. Turner*, 12 Nev. 345.
18. Possession, as against title, in cases supporting adverse claim: *Golden Fleece Co. v. Cable Co.*, 1 M. R. 120.
19. The right to possession comes only from a valid location: *Strepey v. Stark*, 7 Colo. 614.
20. Irrigating land, held evidence of possession: *Courtney v. Turner*, 12 Nev. 345.
21. In ejectment the right to possession is essential to recovery: *Herbert v. King*, 5 M. R. 303.
22. Location on junior discovery, how affected by actual possession of senior claimants: *Faxon v. Barnard*, 9 M. R. 515.
23. Constructive possession of mining claim, how proved: *Roberts v. Wilson*, 4 M. R. 498.
24. Title by occupancy recognized and enforced: *Sears v. Taylor*, 5 M. R. 318.
25. Possession of buildings construed to include possession of three quarter acre quarry lot, though not fenced: *Brown v. Majors*, 7 Wend. 495.
26. Tenant of lands, though without right to work the mines thereunder, is in possession thereof: *Keyse v. Powell*, 2 El. & Bl. 132; *Stratton v. Lyons*, 10 M. R. 314.
27. Possession of surface of lode claim is possession of all lodes within its boundaries: *Pardee v. Murray*, 4 Mont. 234.
28. Possession of drift is possession of all above and below: *Hugunin v. McCunniff*, 14 M. R.
29. Enclosure not necessary: *Barnes v. Sabron*, 4 M. R. 674; *Hamburg M. Co. v. Stephenson*, 17 Nev. 450.
30. Where there is conflicting or double possession the better title prevails: *Rose v. Richmond Co.*, 17 Nev. 26.
31. Whenever preliminary work is required to perfect a claim the law

protects the discoverer in possession during the period necessary to perfect location: *Erhardt v. Boaro*, 113 U. S. 528.

32. Right of possession comes only from valid location: *McKinstry v. Clark*, 4 Mont. 370; *Noyes v. Black*, Id. 527.

33. Possession is sufficient to maintain an action against an intruder but not against an owner who has the right to possession: *Noyes v. Black*, 4 Mont. 527.

34. Possession of a claim without location or upon an invalid location is of no avail against one claiming under a valid location: *Hopkins v. Noyes*, 4 Mont. 550.

WILKINSON V. PROUD ET AL.

(11 M. & W. 33; Blanchard & Weeks L. C. 23. Court of Exchequer, 1843.)

¹ **Estate distinguished from easement.** The right to a given stratum of coal under a certain close is a right to land, and can not be claimed by prescription: *aliter* of a right to take coal in another man's land.

Coal is land. A vein of coal is land, unless distinguished from the land by the deed of conveyance.

Case for an injury to the plaintiff's reversion in certain closes or parcels of land in the occupation of one Gill, as tenant thereof to the plaintiff, alleging that without the leave or license of the plaintiff the defendants dug and excavated divers holes and pits, and erected and fixed divers engines, gins, buildings and posts on the said closes and parcels of land, and dug, worked and won therein divers large quantities of coal, and carried away and converted the same, and also prostrated, subverted and injured the crops, fences, earth and soil of the said closes or parcels of land, and cut down certain trees growing on the same, and undermined a portion thereof, etc.

Second plea, as to the cutting, digging, excavating and making the holes, pits and trenches in the declaration mentioned, and erecting and fixing the engines, gins, buildings and posts in the declaration mentioned, in and upon the said closes and parcels of land, and digging, working and winning the quantities of coal in the declaration mentioned, and drawing, carrying away, converting and disposing of the same to their, the defendants', own use, and prostrating, subverting and injuring the crops, fences and earth and soil in the declaration mentioned, and undermining a portion of the same closes and parcels of land in the declaration mentioned; that John Proud, deceased, and all his ancestors, whose heir he was, from time whereof the memory of man is not to the contrary until the time of making the indenture hereinafter mentioned, have had, and have been used and accustomed to have, and of right ought to have had, for himself and themselves, all the coals and veins of coal in and under the said closes and parcels of land in which, etc., and full and free liberty at all times of the year to enter into

¹ *Caldwell v. Copeland*, 1 M. R. 189; *Huff v. McCauley*, 9 M. R. 268.

and upon the said closes and parcels of land in which, etc., and to cut, dig into and excavate the same for the purpose of searching for, mining and winning the coals in and under the same, and to make adits, shafts and entrances into the mines of coal and veins of coal in and under the said closes and parcels of land, in which, etc., and to do all necessary acts therein and thereon for the purpose aforesaid. The plea then alleged that, by deeds of lease and release, dated the 2d and 3d of September, 1841, the said John Proud bargained and sold the said coal, mines of coal, veins of coal and premises, to one William Richardson, and the defendants then justified the trespasses as the servants of Richardson.

The third plea was framed upon the Statute 2 and 3 William IV, Chap. 71, Sec. 2, and alleged that for the full period of thirty years next before the commencement of this suit the said John Proud, deceased, and his ancestors, whose heir he was, and the said William Richardson, that is to say, the said John Proud and his ancestors, whose heir he was, before and up to the time of making the indenture first hereinafter mentioned, and the said William Richardson, from the time of making the same indenture, have actually taken and enjoyed, as of right and without interruption, all the coals and veins of coal and mines of coal in and under the said closes and parcels of land, and have, during all that time, as of right and without interruption, at all times of the year, entered into and upon the said closes and parcels of land in which, etc., and then cut, dug into and excavated the same, for the purpose of searching for, mining and winning the coals in and under the same, and made adits, shafts and entrances into the said mines of coal and veins of coal in and under the same closes and parcels of land, and done all necessary acts therein and thereon for the purpose aforesaid, etc., etc.

Special demurrer to each of these pleas and joinder in demurrer.

The points marked for argument in the margin were as follows: As to the second plea, that all the coals, veins of coal and mines of coal in and under the said closes, in which, etc., and full and free liberty to enter upon the said closes, in which, etc., to dig, etc., the same, as claimed by the defendants, are corporeal hereditaments a title to which can not be

made by prescription. As to the third plea, that the defendants claim a corporeal hereditament, and that to such a claim the Statute 2 and 3, William IV, Ch. 71, does not apply.

W. H. WATSON, in support of the demurrer.—These pleas are clearly bad, for no right, whether prescriptive or by force, of the Statute 2 and 3 William IV, Ch. 71, can be claimed in other than incorporeal hereditaments. [PARKE, B.—No doubt, you can only prescribe for what lies in grant.] In 2 Blackst. Comm. 264, it is said: “Secondly, as to the several species of things which may or may not be prescribed for, we may in the first place observe, that nothing but incorporeal hereditaments can be claimed by prescription, as a right of way, a common, etc.; but that no prescription can give a title to lands and other corporeal substances of which more certain evidence may be had.” So in Roll. Abr. Prescription B, it is said: “No title to land can be claimed by prescription.” This position being therefore assumed as indisputable, the only question in the present case is, whether the right here claimed is more than a mere incorporeal hereditament. Undoubtedly a mere license to get coal, which does not oust the grantor of his own right to dig for coal in the same land, is a mere incorporeal right, and lies in grant. *Earl of Huntingdon and Lord Mountjoy's Case*, 4 Leon. 147; *Doe v. Wood*, 2 B. & Ald. 724; *Chetham v. Williamson*, 4 East, 469. But a mine or vein of coal, which the pleas here state Richardson, and those through whom he claims, to have been entitled to, is part and parcel of the inheritance, and is a matter whereof a person is seized in fee, as it lies in livery and not in grant. [PARKE, B.—It would be a matter of some difficulty to make livery of seizin of a stratum of coal lying under the soil.] A communication might be made by digging down to it. [ALDERSON, B.—Possibly a symbolical delivery on the surface of the land might be sufficient.] A party entitled to a vein or seam of coal is always alleged in pleading to be seized in fee of the coal. See *Bourne v. Taylor*, 10 East, 189, and *Dand v. Kingscote*, 6 M. & W. 174. In *Sloughton v. Leigh*, 1 Taunt. 402, it was held that a grant which authorized the grantee to take the whole stratum of a mine was a grant of a real hereditament in fee simple, whereof the wife was dowable.

Lord Mansfield there says: "The grant of the stratum might be taken to be a grant in fee simple. In the course of the discussion I was strongly struck with the argument used for the heir, that Lord Coke has, in 1st Inst. 32, enumerated all the species of inheritance of which a woman shall be endowed, and I thought it extraordinary that no mention should be made of mines. But upon referring to the passage, it appears to be no enumeration of all things whereof a woman shall be endowed—nothing like it. In the thirty-sixth section, upon which this is a commentary, Littleton says the wife shall be endowed of all *lands and tenements* of which her husband was seized. Lord Coke says not a word to explain what is land or what is a tenement, thinking the import of those terms well known in the law." Trespass, or ejectment, will lie for a mine, although another has the surface: *Andrews v. Whittingham*, Carth. 277; *Comyn v. Kyneto*, Cro. Jac. 150; *Harebotle v. Placock*, Cro. Jac. 21. In *Lewis v. Branthwaite*, 2 B. & Adol. 437, it was held that the possession of a mine is in the copyholder, and not in the lord, and that the copyholder might therefore maintain trespass for an entry upon it.

MARTIN, *contra*.—A transfer of an unopened mine of coal lies in grant and not in livery. The rule cited from 2 Blackst. Com. 264, is not borne out by the authorities referred to, to the extent there laid down. The authorities there mentioned, viz.: Doctor and Student, Dial. 1, Chap. 8, and Finch, 132, only say "that no prescription maketh a right in lands." The doctrine of prescription is founded on analogy to the Statute of Westminster 1, 3 Edw. I, Chap. 39, whereby the time of limitation on writs of right was made to begin from the period of the return of Richard I from the Holy Land, A. D. 1198. But until the Statute 32 Henry VIII, Chap. 2, land, as well as incorporeal rights, might be claimed by prescription. That statute enacted "that no manner of persons should from thenceforth sue, have, or maintain any writ of right, or make any prescription, title, or claim of, to, or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments of the possession of his or their ancestor or predecessor, and declare and allege any further seizin or possession of his or their ancestor or prede-

cessor, but only within three score years next before the teste of the same writ, or next before the said prescription, title, or claim, so thereafter to be sued, commenced, brought, made or had." Before the term of sixty years was fixed by this statute, the law of England was, that all evidence of title was lost in remote antiquity, and the only period of limitation upon the recovery in a real action was that beyond which it was supposed that "the memory of man was not to the contrary," viz., the reign of Richard I. See Litt. S. 170. The reason why a man cannot prescribe for corporeal hereditaments is stated in *Paramour v. Yardley*, Plowd. 545a, viz., because he has a better title to them by possession and visible enjoyment. That is a reason which is applicable only to the *surface*; but a right to minerals, which may or may not exist under the soil, is a right which lies in grant. It would be difficult—nay, in many cases, impossible—to give livery of seizin of a stratum of coal. As the right to mines has always existed, as distinguished from the right to the surface of the land, the conveyance of them must have been by grant; for livery of seizin is wholly inapplicable to them, at least in the case of unopened mines. In Shep. Touch. 96 (7th Ed.), it is said: "By the grant of minerals, or *fodinas plumbi*, etc., or mines of lead, the land itself will pass, if livery of seizin be made thereof; but otherwise it seems not; and then the grantee hath by the grant a power to dig only granted to him." Upon which Mr. Preston remarks: "A mine *may be* a corporeal hereditament. For instance, *if a mine be open* and granted, the grant is of a corporeal hereditament. In regard to mines not open at the date of the grant, this distinction (a distinction founded on principle), though no decision is found on the point, may be taken. The grantee has an incorporeal and not a corporeal hereditament: *Doe v. Wood*, 2 B. & Ald. 724; an interest which would pass by grant without livery of seizin," etc. And the author proceeds to explain how ejectment lies for a mine which is open, and held under a right of mining. Ejectment, however, will lie for tithes, which are an incorporeal hereditament. The *Case of Mines*, Plowd. 322, is also an authority to show that the right to minerals is one that lies in grant. See also Burton's Law of Real Property, p. 361. An unopened mine may be likened to the case of a grant of

treasure trove, which may be claimed by prescription. Co. Litt. 114 b, e.; Com. Dig. Prescription C. In *Seaman v. Vawdrey*, 16 Ves. 390, the question was whether a purchaser was entitled to compensation for a right to salt-mines under the land, alleged to exist in certain persons, but which had not been exercised for a hundred years; it was held that, notwithstanding the non-user, he was entitled to compensation, no *adverse possession* being alleged. [PARKE, B.—It is not the right of *getting* the coal which is claimed here, but the right to the *stratum* of coal.] Why should not a man claim *timber* upon another man's land by prescription? Whether corporeal or not, it is equally a right in fee simple: *Stanley v. White*, 14 East, 332. In *Stoughton v. Leigh*, the judgment expressly makes a distinction between opened and unopened mines. In *Lord Mountjoy's Case*, the right claimed was only a right of getting the coals in common with the owner of the land, and not an exclusive right.

But even if the court should be of opinion that an unopened mine is not, *per se*, the subject of a claim by prescription, still these pleas are good, because they claim not the mines merely, but also the right of making shafts and adits, and erecting engines on the surface of the soil; and then, a part of the right being claimable by prescription, the pleas may set up a prescription for the whole. [LORD ABINGER, C. B.—Suppose the right to the mines were granted, without the right to enter upon the land.] The grantee of the coals would be entitled to an incidental right to enter and get them: *Earl of Cardigan v. Armitage*, 2 B. & Cr. 197; 3 D. & R., 414. If a portion of an entire right must be claimed by prescription, there is no authority that a man may not prescribe the whole of that entire right.

LORD ABINGER, C. B.—I think this is clearly a prescription to land. A vein of coal is land, unless distinguished from the land by the deed of conveyance. I have little doubt that if Mr. Martin were to search the Year Books he would find cases to show that such a claim is contrary to law. The defendants may amend on payment of costs.

PARKE, B.—This is not a claim of a prescriptive right to take coal in the plaintiff's close but a prescription for all the

strata and seams of coal lying under it; that is, for a part of the soil itself, and not for the right to get the coal, which would be the subject of a grant. Possibly the defendants may be able to amend by pleading a seizin in fee in the strata of coal, or by prescribing for the right to take coals in the plaintiff's close. With respect to the last argument urged on behalf of the defendants, according to that a man might set up a prescriptive right to a farm and lands, together with a right of way over an adjoining close.

ALDERSON, B., and GURNEY, B., concurred.

Leave to the defendants to amend on payment of costs; otherwise,

Judgment for the plaintiff.

1. Proof that defendant as one of the public had taken sand *ad libitum* from the beach, and not as incident to an estate in other lands, held no proof of an individual prescriptive right: *Merwin v. Wheeler*, 41 Conn. 14.

2. A surveyor of highways can not justify a trespass under a prescriptive right or custom to take stones from the waste adjoining sea-shore for repairing the highways: *Padwick v. Knight*, 7 Exch. 854. *Contra*, Prescriptive right to take clay without limit and for sale, held good: *Salisbury v. Gladstone*, 17 Com. B. N. S. 842.

3. Requisites of prescriptive title to use of water: *American Co. v. Bradford*, 15 M. R. —; *Blackett v. Bradley*, 1 B. & S. 940; *Magor v. Chadwick*, 11 Ad. & El. 571.

4. Prescriptive right as against patented land can not have its inception prior to the purchase from the United States: *Ogburn v. Connor*, 46 Cal. 347.

5. The California Code fixes the prescriptive period at five years, but does not define what are prescriptive facts: *Woodruff v. North Bloomfield Co.*, 1 West C. R. 183.

6. Prescription distinguished from adverse possession: *Caldwell v. Cope-land*, 1 M. R. 189.

See ADVERSE POSSESSION; STATUTE OF LIMITATIONS.

SCOTT V. CLARK ET AL.

(1 Ohio State, 382. Supreme Court, 1853.)

Outfitters and adventurers—Distribution of profits. Scott, in 1849, paid money into the treasury of a company outfitting for California, to entitle Clark to membership therein, upon agreement that he, Scott, "should have a full half share of all that Clark is entitled to by being a member of said company." The company proceeded to California, where, on April 10, 1850, just one year after starting, they dissolved by unanimous vote, their original rules providing that they should not dissolve until after one year, nor until return to the "United States," but also providing for amendment by a two thirds vote. Upon dissolution, a dividend of \$1,780 per man was declared. The various members then took up new claims, more or less in concert, but not as a company. Clark made a profit also out of these claims. Upon his return, Scott claimed one half of what Clark had received both before and after the dissolution: *Held*, that the dissolution was valid under the amendment clause, and that plaintiff was entitled to one half of the \$1,780 only, after deducting \$500 to cover defendant's return expenses.

¹**Profits after disbanding.** While the company was in existence and working an old claim, they located a new claim, but were only able to do enough work to hold it, the season not permitting active mining; after the dissolution Clark worked this claim and cleared \$1,000, which was held not within the contract. ¹

This is a bill in chancery, reserved in the District Court in Guernsey County; the case fully appears in the opinion of the court.

COWEN & PECK, for complainant.

KENNON, for defendant.

CORWIN, J.

By a written contract of the parties, of April 9, 1849, Scott bound himself to pay into the treasury of "The Oxford California Mining and Trading Company" the sum of one hundred and seventy-five dollars, to entitle Clark to membership therein. Clark bound himself "to give said company the privilege of retaining and paying over to the said

¹ *Waring v. Cram*, 12 M. R. 280; *Fletcher v. Hawkins*, 11 M. R. 290; *Hout v. Smith*, 12 M. R. 306.

Scott, his heirs or assigns, a full half share of all that he is entitled to, by being a member of said company."

Scott paid the money, and Clark signed the constitution of the company, on the 10th day of April, 1849, and went with the company to California, and remained and served with them until the final dissolution of the company, on the 10th day of April, 1850.

The eighth article of said constitution provides that "this company shall continue to exist for one year from the time of leaving Middletown, unless two thirds of the members determine otherwise. But in no case shall the company be dissolved, or a dividend struck, until their return to the United States."

The fourteenth article provides, "that any article of this constitution may be altered or amended at any time by a vote of the members, except the tenth (relating to compensation to sick and dying members), which shall in no case be altered or amended." On the route to California, one of the members, Mosier, died; and after their arrival there, another, Morrison, left the company. The remainder of them located on Gold Run, in September, 1849, and continued their operations there until the 10th of April, 1850, which was just one year from the time they left Middletown, when, by a unanimous vote, the company was dissolved, and each member thereafter acted for himself. At the dissolution, Clark's share of the assets was ascertained to be \$1,780, one half of which, subject to a deduction of the amount due to the representatives of the deceased member under the 10th article, and of a reasonable amount to defray expenses home, Clark proposed to leave with the treasurer of the company, for the use of Scott; but the treasurer refused to receive it, and the whole amount was paid over to Clark.

On the 22d of February, 1850, under the rules and usages of California miners, a new "claim" was made by the company on Deer Creek, as a place for future operations, to maintain which two members of the company went every ten day and threw up earth and "made marks" upon it, as evidence of the continuance of their claim. This claim was not susceptible of being worked in the winter and early spring, on account of wet weather, and in fact, no gold was digged or

work done upon it, until after the 10th of April, 1850, when Clark and two or three others went there and commenced digging. Clark sold his interest in this claim for \$1,000. Soon afterward he bought another claim for \$3,000, which he sold in a few days thereafter for \$6,000, and returned home.

This bill is filed for a settlement of the account between the parties, and it is claimed by complainant that he is entitled to one half of the net proceeds of Clark's trip to California; and by defendant, that he is liable only for one half of what he realized as a member of the company, during the continuance of its organization.

Although the 8th article of the constitution of this company provides that the company shall not be dissolved, or a dividend struck, until their return to the United States, yet it also plainly contemplates and provides for a disorganization of the company, for all business purposes, and a cessation of all further enterprises and operations by the company as such, whenever two thirds of its members should so determine; and the restraining clause of said article was evidently designed only to secure the dividends to be made after their return to the United States. And we can not give such a construction to the article as to say that, by its force, after the company was in fact disorganized and disbanded by a unanimous vote of the members and its assets divided, and each had gone to work on his own account and his own responsibility, the company still existed, and that the individual acquisitions of each should belong to the company. It certainly was never so intended by the parties, and such a construction would be inconsistent with the other power contained in the same article, namely, the power of two thirds of the members, at any time, to determine its existence. But we are relieved of any difficulty in the construction of this article, by the fact proven in the case, that prior to the dissolution the members of the company, as they might rightfully do under the 14th article above quoted, amended the 8th article by rescinding the clause requiring their return to the United States, before dividend.

The rights of complainant are, therefore, necessarily limited to the one half of the interests of Clark, as a member of the company, at the time of its dissolution. This of course ex-

cludes from the account the proceeds of the claim which Clark subsequently purchased and sold, and leaves us only to consider whether the interest sold by Clark, in the Deer Creek claim, was held by him in his own right, or as a member of the company.

The testimony of all the surviving members of the company has been taken; and, although some of them speak of the "claim" having been made and located by the company, yet the other facts and circumstances testified to make it clear that such "claim" was never designed for the benefit of the company, as such, and never was owned or worked by the company. Before the "claim" was located, the dissolution of the company had been resolved upon—the claim was worthless until it could be worked, and it was impossible to work it until late in the spring, on account of wet weather, it being that description of claim known in California as "wet diggins." The company was dissolved and its assets divided, without any reference to this "claim," and it was ultimately resorted to by a part only of the members, after the dissolution. We think this item can not be included in the account between these parties.

The defendant claims to be allowed a commission of seven *per centum* for the custody and care and transportation of the gold dust, and has proven such charge to be customary; but he has not shown that he was subjected to any expense for insurance or otherwise, on account of such transportation; and we think that, upon a reasonable allowance for the expenses of a safe and convenient passage from home, this charge ought not to be allowed.

A decree may be taken by complainant for one half of the sum of \$1,780, received by defendant, at the dissolution of the company, deducting therefrom the sum of \$254, the amount due the estate of Mosier, for which a decree was entered below, and the sum of \$500 to cover defendant's expenses home, with interest upon the balance thus ascertained from the time of the filing of the bill, each party to pay his own costs.

Decree accordingly.

WARING V. CRAM ET AL.

(1 Parsons' Select Equity Cases, 516. Common Pleas, 1st District; Pennsylvania, 1850.)

¹ Use of partnership capital after dissolution. If a partnership, after its termination by death, dissolution, bankruptcy, or otherwise, is continued by any portion of the associates with the capital or appliances of the firm, all profits derived from such continued business are part of the joint estate, and as such, are to be accounted for to all the partners or their representatives.

² Clandestine profits. If one partner clandestinely carries on another trade, or the same trade, for his private advantage, and in a manner injurious to the true interests of the partnership, he will be compelled in equity to account for all profits made thereby.

Misapplied capital and stolen time. If one of several partners employ the partnership capital or effects, in a matter not the direct object of the association, he must account with his copartners for the profits resulting from such an employment of the common effects. If the common stock and fund or capital of a copartnership consist of labor and skill, as well as money, and during the existence of the enterprise, either diverts that from the common object to which, it was pledged and employs it for other productive purposes, either of the same or any other kind, he must bring the result into the common fund.

³ Prospector engaging in other business. Where a number of individuals formed an association for a specified term to engage in mining for gold in California, and one advanced money and the others agreed to proceed to the mines and engage in the digging for gold, but when they arrived, the capital advanced being exhausted, all abandoned the enterprise as fruitless, and two of them engaged in another and different employment of their labor, it was held that the associate who advanced the money had no such specific lien on the profits produced by such labor, as could be enforced in a court of equity. His remedy, if any he had, was by an action for damages against those who abandoned the association.

Injunction—Answer used as affidavit. The apparent weight of authority is that an answer filed, after notice by the plaintiff of an application for a special injunction, can only be used as an affidavit; and the defendant can not insist that, under such circumstances, the plaintiff is confined in his injunction to the equity confessed in the answer.

Clear equity required before injunction issues. A court of equity never awards a special injunction, except when the plaintiff shows a clear equity entitling him to the aid and relief asked for; nor is it ever awarded except in clear cases of right.

Bill in equity, filed by Hiram Waring against Smith Cram

¹ *Phillips v. Reeder*, 11 M. R. 419.

² *Burton v. Wookey*, 11 M. R. 342; *Collins v. Case*, 1 M. R. 91.

³ *Rhea v. Tatham*, 11 M. R. 321.

and Chas. S. Cram, setting forth that in January, 1849, the complainant entered into an agreement with the respondents, and six others, whose names were mentioned, by which they formed an association for the business of mining and collecting gold and other minerals in California, under the name and style of the "Putnam Mining Company."

That by the terms of the agreement, the complainant was to furnish at his own expense, to each of his associates—he remaining in this country—a passage to Chagres in the steamer Falcon, and also advance them the sum of \$1,500, to be by them expended in defraying the expenses of their journey from thence to San Francisco, in California, and thence to the region of the gold mines, and that he would provide them with a suitable outfit for proceeding to the region of the gold mines, and for undertaking their contemplated business on arriving at the gold regions. That it was further agreed that he would resort only to his share of the clear net profits of the business for the re-payment to himself of the sum advanced by him for said purpose, and that he would deposit all the gold dust and ore sent to him by his associates in the mint of the United States. That at the end of two years from the date of the agreement he would pay for and provide a passage from California for each of said associates or so many of them as might desire to come to New York, and to keep just account of all articles of merchandise sent to said associates at prime cost, and of all expenses, for which he was to be paid, as provided in said agreement.

It was also averred in the bill, that in consideration of these stipulations on the part of the complainant, his said associates agreed to proceed at once to Chagres and thence with all practicable speed to the region of the gold mines in California; to apply the said \$1,500 toward the expenses of their journey to the mines, and upon their arrival would faithfully employ themselves in the business of mining and collecting gold and other minerals, and from time to time, as a safe opportunity might occur, to ship and send, consigned to the complainant, in the city of New York, such gold dust, ore, or other minerals, as should be collected by the parties of the second part to said agreement. And also that they would receive such articles of merchandise as should be sent to them by the complainant and allow him therefor in the final settlement of the business and

affairs of the association and his expenses in the premises. And further, that the association should continue for two years from the date of the agreement and should not be dissolved by the death of any or either of the parties, but should be carried on in such manner and place in California as should be prescribed by a majority of the parties to the agreement. That if any one of them should become sick, he should be provided for at the cost of the association, and that, at the expiration of the two years, there should be a full settlement of the affairs of the association, and the avails and proceeds of the business should be divided, by first paying the complainant for all the articles and merchandise sent to his associates, the expenses thereof, insurance, etc., and the price of the home passage of his associates; second, all the reasonable expenses of said associates in carrying on their business; and out of the clear gains and net profits the complainant should be entitled to receive one equal half part, and the other half part was to be equally divided among the other associates. It was also further stipulated in the agreement, if during the continuance of the association either of said parties should be absent from or leave the association, or refuse or neglect to employ himself in the business in the manner and place provided by a majority of the parties, such party or parties should forfeit his or their share or shares in the proceeds and avails of the business, and all his right thereto should be at an end and absolutely cease and determine, and his share therein should be distributed, one half to the complainant and the other half among the other associates. The agreement was in writing and a copy annexed to the bill.

It was then averred that the complainant made the advances, furnished the outfit, and in all things fully complied with the stipulations in the agreement. That the other parties to the agreement set out for California, according to the stipulations therein, and that all with the exception of the respondents remained there, so far as the complainant knew; but that the said Smith Cram and his son Charles had returned to the United States, and were in Philadelphia or New York, and that the said Smith Cram had brought with him a large amount of gold dust, valued at \$11,734, which was deposited in the mint at Philadelphia in his name, for which he had received the certificate of the proper officer.

It was further averred that Smith Cram went to California, as one of the associates, and received his advance and outfit from the complainant and was bound to pay over to him all the gold dust or minerals which might be acquired by him during the two years, to be disposed of by the complainant according to the terms of the articles.

That during his residence in California said Cram collected and received a large quantity of gold dust, etc., which, according to the articles of agreement, should have been paid over, sent, or shipped to the complainant, and that said Cram should have remained to prosecute his labors, which appeared to have been successful for the whole period of two years, for the benefit of his associates and himself; but, having received a large quantity of gold dust, he had abandoned his associates and returned to this country, and instead of shipping the gold dust to the complainant, he was retaining it, and had given him no information or account of said gold, but had privately deposited it to his own use in the mint, to be coined and turned into current money.

After propounding the interrogatories, there was a prayer for a decree that the sum so deposited be paid to the complainant for the use of the association, and that Smith Cram be restrained by injunction from receiving the money from the mint, or otherwise interfering therewith, with a prayer for general relief.

Notice was given for a special injunction, and before the argument of the motion the respondent filed an answer in which it was admitted that the contract was as stated in the bill, under the name and title of the "Putnam Mining Association," and that the complainant did furnish the outfit to the respondent before leaving New York, and did pay his passage from Chagres, as stipulated in the articles, in the steamer Falcon. But it was denied that any part of the \$1,500 was paid to the deponent; what he knew of this was, that he saw at Panama \$1,025 in the possession of the brother of the complainant; that this sum was entirely inadequate to take him and associates to the mine, and that in consequence thereof they were delayed three months at Panama, and finally were enabled to leave only by procuring contributions from other sources. It was further stated that all the parties except

the respondent and Chas. Cram were not in California acting under such articles of association; that the said respondent went to California, but did not receive the advancement stated in the bill from the complainant, and therefore was not bound to pay over the gold and minerals acquired by the respondent during the two years. The answer averred that during the residence of the respondent in California he did not collect or receive a large quantity of gold dust or other minerals in the way of mining under the agreement, which, according to the terms thereof, should be paid over, sent, or shipped to the complainant; nor was he bound to remain to prosecute his labors under the same, for the space of two years, for the benefit of himself and associates; nor, after collecting a large quantity of gold dust, did he abandon his associates; but on the contrary the said association, for the want of proper advances by the complainant, and misfortunes, turned out disastrous, and the members thereof scattered in different directions in a few weeks after arriving at the region of the mine, and each one was obliged, for self-protection, to labor to obtain the necessities of life and betake himself to his own individual means and industry; that the respondent did not collect gold dust enough at the mines, or other minerals, to pay his necessary expenses, and left the same from the necessities of his situation, and with his son Charles betook himself to industrious mechanical work as a pile driver in the town of San Francisco, where and by which means he made, by day's labor, driving piles at so much a pile, all the money which he deposited in the mint, for which he received on deposit, the receipt or certificate mentioned in the bill. The respondent denied that he had deposited in the mint at Philadelphia any gold dust or any other minerals in his own name which in any manner or form was the property of the association, or in fraud of his agreement and stipulations. It was distinctly stated that the association had broken up and was largely indebted to the respondent, and the whole equity of the bill was denied.

A motion was made for a special injunction, which, on notice, was argued before Judges KING and PARSONS.

It was argued by Messrs. J. WILLIAMS BIDDLE and H. J. WILLIAMS, for plaintiff; and J. MURRAY RUSH and P. M'CALL, for the respondents.

The following opinion was delivered by KING, President.

It is a doctrine of the law of partnership, that if, after the termination of any partnership by death, dissolution, bankruptcy, or otherwise, the business is continued by a portion of the associates with the capital or appliances of the firm, all profits derived from such continued business are part of the joint estate, and as such are to be accounted for to all the partners or their representatives, reasonable allowances being made to those of the associates by whom the active business has been conducted. These principles are the result of the cases of *Crawshay v. Collins*, 15 Vesey, 218; 2 Russell, 325; *Brown v. De Tastet*, 1 Jacobs, 284; *Wedderburn v. Wedderburn*, 2 Keene, 722; *Long v. Majestre*, 1 John. Ch. 305; *Holden v. M' Makin*, 1 Pars. Sel. Ca. 270. It is a principle equally clear, that if one partner should clandestinely carry on another trade, or the same trade, for his private advantage, and in a manner injurious to the true interests of the partnership, or should divert the capital or funds of the partnership to such secret or sinister purposes, he will be compelled in equity to account for all profits made thereby: Story on Part. 273. In *Burton v. Wookey*, 6 Madd. 367, a partner making purchases, on his private account, of merchandise in the trade in which his firm was engaged, was held liable to account to his partners for the profits of such purchases. "It is," says Sir John Leach in that case, "a maxim of the courts of equity, that a person who stands in a relation of trust or confidence to another shall not be permitted, in pursuit of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust and confidence." Nor will equity permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gives them a direct interest adverse to the original objects of their association: *Glassington v. Thwaites*, 1 Sim. & Stuart, 124, 138. And if one of several partners employ the partnership capital or effects in a matter not the direct object of the association, he must account with his copartners for the profits resulting from such an employment of the common effects. This was the case in *Fanning v. Chadwick*, 3 Pick. 210, where the defendant, who was

a joint owner and commander of a whaling ship, having received compensation in the course of his voyage for landing some prisoners, and also for saving property from a wreck, was held liable to account with his copartner for the money so received.

In all this class of cases it will be perceived that the profits, of which an account was decreed, were derived either from the employment of the capital or appliances of the firm in the same business, in an analogous one, or in some new or incidental undertaking. It was because the profits claimed flowed from the use and employment of that which belonged to all, that the equity of all to participate in such profits arose. This principle is one too clear to be questioned. But to bring this case within these admitted principles, it was argued that the labor of the associates forming the "Putnam Mining Company" was part of the capital of the association, and that all results of that labor, whether employed in mining or in any other pursuit in California, was the employment of that which belonged to the association, and entitled all the associates to participate in its results.

That the common stock, fund or capital of a copartnership may consist of labor and skill as well as money, goods, or other property, is certainly true. One associate may contribute money, another property, and a third labor and skill. And if, during the existence of the enterprise, either party diverts that from the common object to which it was pledged, and employs it for other productive objects, either of the same or any other kind, he must bring the results into the common fund; because the consideration given by each for a joint participation in the common profits of the society, was the amount of money, the quantity of property or the extent of labor and skill agreed to be furnished and employed for the common good by each respectively. If either associate could abstract his contribution, whether money, property or labor, from the common capital, and employ it for his own profit, it is plain that he will receive his proportion of the profits of the joint concern without any corresponding consideration. So far this doctrine of implied obligation, arising from the *subsisting* relation of partner and copartnership, is consistent with right reason, common justice, and mutuality of obligation

between contracting parties. It simply operates to maintain good faith between the associates, and to oblige all who claim the benefit of the joint enterprise to contribute to its success that which each bound himself to do on entering into the association.

But the case before us is not that of one who, while the continuing member of an existing partnership, to the business of which he has bound himself to devote all his labor and skill, withdraws a portion of that labor or skill from the common enterprise, and devotes it to his individual profit or advantage.

The defendants answer shows that, after an unsuccessful attempt by the associates in California to procure gold at the mines, all abandoned the enterprise as hopeless, and each sought to procure his own subsistence as best he could. The small fund advanced in New York by the plaintiff, who was the money partner, was exhausted before the arrival of the associates at the mines, and all exertions terminated with the failure of the first attempt, and seeing their destitute condition, it is difficult to perceive how it could have been renewed with any rational prospect of a successful issue. Under these circumstances defendant returned to San Francisco, and there successfully employed his industry as a pile driver, from which source alone he has derived all the money which, by this procedure, the plaintiff seeks to possess himself of, as part of the result of the labor of the "Putnam Mining Company."

It is difficult to perceive how this result could legally arise, even supposing the defendant to have wrongfully withdrawn from the company, and to have devoted his industry to other pursuits than those originally contemplated by the articles of association, unless we should hold that one of the effects of entering into a copartnership for a term of years is so to bind a party to it as to force him to prosecute, under the most unpromising circumstances, such an enterprise; and that the estimate of the damages sustained by the partnership from his withdrawal from it, must at least be all that his industry employed, during the undetermined part of the partnership, no matter how realized. Of his liability for such damages as a jury on trial at law might award against him under the circumstances of such a withdrawal, no doubt can exist. These might

be more or less than the subsequent earnings of his industry otherwise employed. But such a claim for damages could only be determined at law, and no specific lien exists on the avails of his intermediate labor that a court of equity could enforce by restraining him from the use of it before any alleged damage arising from his withdrawal from the business of the partnership had been ascertained by trial and verdict.

The present is not the case of an unauthorized and unnecessary abandonment of the joint enterprise. The answer and affidavit of the defendants, which are uncontradicted by any counter affidavit of the plaintiff, exhibit a case in which the association or partnership admitting it not to have been formally dissolved was dissolved in fact by the associates in California, from their total destitution of funds or other means for the further prosecution of their enterprise, and from their mutual and necessary separation arising from these causes. According to the apparent weight of the authorities it is true that the answer filed after the plaintiff has served his notice of a motion for a special injunction, can only be used as an affidavit in opposition to those used by the plaintiff, and that the defendant can not insist that under such circumstances the plaintiff is confined in his injunction to the equity confessed in the answer: *Atkinson v. Collins*, Hogan's Rep. 110; *Morphett v. Jones*, 19 Vesey, 350. But giving for the purposes of this case no greater efficacy to the uncontradicted answer, it fully establishes the foregoing as the causes which produced the dissolution in fact of the "Putnam Mining Company."

To hold that in such a state of things the avails of the labor and skill of each of the adventurers, wherever and however employed in California, are to be deemed the assets of the company, would be carrying the doctrine of the implied accountability of copartners to the partnership to a most extravagant length. The money on which the injunction is proposed to operate is neither the proceeds of the capital of the company employed after its dissolution, nor is it the result of the surreptitious employment of the labor or capital of the company during its actual existence by one of the associates for his own profit, nor is it the result of such labor and capital incidentally employed in objects different from those of the company by part of the associates. In such cases equity either has actually

compelled, or expressed itself prepared to compel, an account of such profit for the common benefit of the partnership.

If it had been the intention of these parties that, in the event of any one of the associates withdrawing from the company and otherwise employing himself, the avails of such employment should inure to the common benefit, it was an easy thing to have introduced such understanding into the articles. The case of separation of individuals from the association before the term limited for the close of its existence, was in the contemplation of the associates. The case of such a withdrawal, or desertion, as it is called in the articles, was provided for, and the penalty on the deserter was fixed as the forfeiture of all his interest in the profits of the company, accumulated at the time of his desertion. The effort here is to introduce through the action of this court a new and stringent term into the contract of association, not expressed in it. But even if such a term had been found in the articles, still such a liability could only have arisen from a willful and unnecessary abandonment of the enterprise, and would not have been consequent on an abandonment induced by inevitable and uncontrollable circumstances.

If the continuing partners of the "Putnam Mining Company" or any of them, have sustained any special damage from the unjustifiable withdrawal of the defendants from the association, the remedy for the wrong is to be sought for at law. Equity can exercise no jurisdiction enabling it to possess itself of the results of the labor of such seceding partner, and to retain them to await the result of such an action, and to apply them to the payment of any damages a jury might award to the injured party. This would be, under most circumstances of alleged breach of contract complained of, an energetic measure, and one certainly that no court has the right to employ in a case like the present.

On the case therefore disclosed, the plaintiff can not obtain the relief he asks here, and consequently we can not properly award a preliminary injunction, which is never awarded except where the plaintiff shows a clear equity, entitling him to the aid and relief of the court. A preliminary injunction is emphatically the strong arm of the court, and is never awarded except in clear cases of right, and where no doubt exists as to the claim of the plaintiff to the remedy he invokes.

THOMPSON V. PROUTY.

(27 Vermont, 14. Supreme Court, 1854.)

Traveling expenses on prospecting adventure. Defendant, in consideration of \$500 paid him by the plaintiff, agreed to go to California and there labor to the end of the current year, 1850, and in 1851, so long as to give him a reasonable time to reach home by December 1, 1851, there to divide the avails of the expedition. *Held*, that defendant could not deduct from these avails the expenses of his journey home, if he delayed returning an unreasonable period, but that the time up to which he must account was to such a period prior to December 1st as would have enabled him to reach home by that date.

Consideration of the items to be allowed on such accounting, as to wearing apparel, the original advance of \$500, etc.

Assumpsit, upon a contract in writing, made by the defendant at Jericho, May 11, 1850, in the following words:

"Know all men by these presents that I, Nehemiah Prouty, of Jericho, County of Chittenden and State of Vermont, for and in consideration of the sum of five hundred dollars paid to me by Orley Thompson, of said Jericho, the receipt whereof I do hereby acknowledge, having agreed and solemnly promised, and do agree and solemnly promise, to make an expedition to California, the providence of God not preventing, and there laboring, if health permits, the remainder of 1850, after reaching the place of destination, and as much of 1851 as can be used and give me reasonable time to reach home by the first of December in said year, and there equally divide the entire avails of said expedition with said Thompson, up to eight thousand dollars.

If over that sum should be procured there is to be no division with said Thompson; and an equal division of any sum less than that, if it be all of the avails of said expedition, shall absolve me from all claims said Thompson has on me for the aforesaid five hundred dollars."

The breaches assigned were, that the defendant did not labor the time specified and divide the whole of the avails of the expedition. The declaration also contained the general money

¹ *Isaacs v. McAndrew*, 9 M. R. 690.

counts. Plea, the general issue; trial by jury, May term, 1854, PECK, J., presiding.

It appeared that soon after making said contract, the defendant went to California and remained until April, or May, 1852; that on the 14th of October, 1851, he had expended the \$500 received from the plaintiff, in the prosecution of the business contemplated by his contract, and then had a balance of about \$600 for his earnings above his expenditures, up to that time; and having concluded not to return home until after the first of December, he sent \$200 to the plaintiff, retaining the balance of the \$600 for himself, and from that time treated the contract as at an end. At this time the defendant was nearly destitute of necessary clothing, having, a few weeks previous, while in the prosecution of his business under the contract, lost nearly all of his clothes by fire.

The defendant insisted that the \$500 paid to him by the plaintiff did not become a part of the common fund, and that the plaintiff was entitled to a division only of the residue, after deducting said sum of \$500 and the other necessary expenditures; but the court instructed the jury that, it having been expended in the business under the contract, it must be treated as going for the common benefit of both parties, and that the defendant was not entitled to be reimbursed for it out of the earnings or accumulations. The defendant further claimed that he was entitled to retain from said \$600 the expense of returning from California, and of supplying the necessary clothing which he had lost by the fire; and the plaintiff's counsel conceded that these would have been proper charges on the part of the defendant if he had returned by the time specified in the contract, and objected to them solely on the ground that the defendant had waived and lost his right of retaining anything for these purposes by his neglecting to return by the first of December, 1851, and electing to remain there longer. The plaintiff also claimed that he was entitled to a division of the defendant's earnings up to the time of his actual return. The plaintiff's testimony tended to show that from the 14th of October to the 1st of December was more than a reasonable time for the return of the defendant, and the defendant's tended to show that it was not. The defendant's testimony also tended to show that the \$200 sent to the

plaintiff was more than half the earnings after deducting the expenses over and above the \$500, and the reasonable and necessary expense of supplying the lost clothing and returning home.

The court charged the jury that if they found that the time from the 14th of October to the 1st of December was no more than a reasonable time for the defendant to return and reach home by the 1st of December, that the defendant was justified in terminating the contract at that time; that he had the right of retaining from the common funds sufficient to supply such necessary clothing, suitable for him in his circumstances, as he was destitute of by reason of having lost the same in the prosecution of the business contemplated by his contract, and also a sufficient sum for his passage and other necessary expenses home, and that he was entitled to retain these sums, the same as though he had returned by the time specified in the contract; that it was optional for him to return by the 1st of December or remain longer, and that the plaintiff was entitled to receive only what he would have been entitled to had the defendant returned at the time contemplated. To this charge the plaintiff excepted. Verdict for the defendant.

UNDERWOOD & HARD, for the plaintiff.

GEORGE F. EDMUNDS, for the defendant.

The opinion of the court was delivered by BENNETT, J.

This is an action of assumpsit on a special contract, evidenced in writing. Its provisions are somewhat peculiar, and the contract itself may be referred to. I, for one, should have had some doubt whether, by a fair construction of the contract, the \$500 was not to have made a part of the common fund; but the defendant having given a different practical construction to it, we are disposed to adopt his in that particular.

The decision of the county court in relation to the termination of the contract, was very clearly correct; but as to the defendant's right to retain for his expenses home, we think it was erroneous. The defendant chose to violate his contract in this particular, and not to return home according to the

obligations of the contract. It might be a matter of some considerable importance to the plaintiff to have him return when the contract was put an end to, that the parties might come to a settlement. Though the defendant saw fit at a subsequent time to return, yet, having violated the contract on his part, we can not see how his subsequent return can give him a right to retain under it.

The exceptions show that the plaintiff admitted on the trial that the defendant would have had a right to have retained out of the common fund, to have made him good for the lost clothing and expenses home, if he had returned in pursuance of the contract. Under this admission, his not returning can not affect his right to retain for the lost clothing, though we might think that the defendant had no right to retain for the lost clothing by the terms of the contract; yet, as this was virtually conceded to be his right, the court should not be complained of by the plaintiff for acting upon his admissions.

The judgment of the county court is reversed and the case remanded.

BREED V. JUDD ET AL.

(1 Gray, 455. Supreme Court of Massachusetts, 1854.)

¹ **Infant can not rescind executed contract.** An infant, in consideration of an outfit to enable him to go to California, agreed, with the assent of his father, to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterward sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was *held*: that he could not rescind the agreement, and recover back the amount so sent, deducting the amount of the outfit and any other money expended for him by the other party in pursuance of the agreement.

Action of contract to recover the sum of \$765.99, the proceeds of the sale of forty-two ounces of gold dust sent from California to the defendants by the plaintiff.

At the trial in the court of common pleas, before BISHOP, J., the defendants admitted the minority of the plaintiff, and

¹ *Hall v. Butterfield*, 59 N. H. 354; 47 Am. R. 209.

that they received the gold dust in pursuance of a contract between them and the plaintiff, by which the defendants furnished the plaintiff with an outfit to enable him to go to California, and the plaintiff, in consideration thereof, gave the defendants the following promise in writing:

"SOUTH LEE, March, 1851.

I hereby agree to give Judd Brothers a correct and honest one third of all the avails of my labor while in California, or absent from this place.

JOHN WELLS BREED."

The defendants introduced evidence tending to show that said contract was deliberately entered into; that it was beneficial and reasonable, and sanctioned by the plaintiff's father, and that the sum received by the defendants was not more than one third of the avails of the plaintiff's labor in California during an absence of nine months. The defendants, the plaintiff objecting, also gave evidence of contracts made by them and by others with other young men going to California, for the purpose of proving that their contract with the plaintiff was fair and reasonable. The objection to this evidence was not pressed at the argument.

The plaintiff contended that although the defendants did receive the money by virtue of the alleged contract, yet he might avoid the contract and recover back in this action the money received, less the amount of the outfits and any money laid out and expended for the plaintiff in pursuance of such contract.

But the judge ruled that if the contract was beneficial to the plaintiff, and obtained by no fraud or unfairness, and was for a good and reasonable consideration, and sanctioned by his father, and the money was received in virtue of the contract and in execution thereof, the plaintiff could not rescind the contract so executed, and recover the balance over the amount of the outfit and any other money expended by the defendants in pursuance of the contract. The verdict was for the defendants, and the plaintiff alleged exceptions to these instructions.

The arguments were had at September term, 1853.

M. WILCOX, for the plaintiff.

J. E. FIELD, for the defendants.

THOMAS, J.

There is no subject, perhaps, on which there has been more apparent conflict of opinion than upon the effect to be given to the contracts of infants. Especially is this so upon the questions what contracts are obligatory, what voidable, what absolutely void, and how far the execution of the contract and the enjoyment of its benefits by the infant affect his power to rescind and recover back the consideration paid, in cases where he is unable, or does not offer to restore what he has received or its equivalent, or where from the nature of the case such restoration is impracticable.

This case, however, does not involve the discussion in which *Holmes v. Blogg*, 8 Taunt. 508; 1 Moore, 466; *Corpe v. Overton*, 10 Bing. 252; 3 Moore & Scott, 738; *McCoy v. Huffman*, 8 Cow. 84; *Weeks v. Leighton*, 5 N. H. 343; *Harney v. Owen*, 4 Blackf. 337, and *Medbury v. Watrous*, 7 Hill, 110, are the leading cases—how far money paid by an infant, without having enjoyed the consideration, or upon an inadequate consideration, or by way of penalty, may be recovered back—as the jury must have found, under the instructions of the court, that the consideration upon which the gold dust was remitted to the defendants was not only adequate but beneficial to the plaintiff.

But what was the contract? In substance and effect, it was that the defendants should furnish the outfit, and that the plaintiff should furnish his labor and time, and that of the fruits of the enterprise the plaintiff should have two thirds and the defendants one third. The amount of the outfit furnished does not appear, but it does appear that the contract was reasonable and beneficial to the infant. No time was prescribed for the plaintiff to be absent. He was in fact absent nine months. The contract was fully executed; the defendants received their share of the fruits of the enterprise, the plaintiff retained his.

The case has been argued as if the gold dust were the result of the plaintiff's labor alone; whereas it was the result of the union of the labor of the plaintiff and the capital of the defendants.

The offer of the plaintiff to deduct from the sum to be recovered the amount paid for his outfit and expenses, would not place the parties *in statu quo*. The defendants took the risk of the life, health, and good fortune of the plaintiff. If the enterprise had wholly failed, they would have had no claim upon the plaintiff for remuneration, and the capital advanced would have been wholly lost. To make the defendants whole, they must be compensated for the risk assumed, and under all the circumstances of the case the sum advanced was deemed a reasonable consideration for a third part of the proceeds of the plaintiff's labor. The measure of compensation is to be determined, not by the result, but by the circumstances existing when the agreement was made.

It may be suggested that this construction of the agreement makes the contract of the parties one of partnership, and that by a contract of partnership an infant can not be bound. So long as the contract remains executory this is true. After the plaintiff had received the defendants' money for his outfit and voyage he could not have been compelled to perform the contract and go to California. Upon his arrival there, he might have elected to rescind the contract. He might at his own pleasure have terminated the agreement. But he chose to do none of these, but to proceed and perform his agreement, and to pay over to the defendants their just proportion of the proceeds of the business. And we know of no ground upon which, after arriving at full age, he can change the entire character of a contract so made and executed, treat the money so advanced by the defendants as a simple loan, and claim for himself all the fruits of an enterprise in which their money and his labor were the common stock, and this when the contract as originally made is found to have been fair, reasonable, and even beneficial to the plaintiff.

The ground upon which the plaintiff has put his case is that the contract, not being for necessities, was voidable, and that though executed, he might rescind it upon placing the defendants *in statu quo*, and that this he offered to do.

In the view of the case already stated, it is not necessary to determine whether the outfit furnished to the plaintiff would be included within the necessities for which a binding contract might be made by an infant. It is by no means, however,

to be assumed that it would not. It would be difficult to lay down any general rule upon this subject, and to say what would or would not be necessities. It is a flexible, and not an absolute term, having relation to the infant's condition in life, to the habits and pursuits of the place in which and the people among whom he lives, and to the changes in those habits and pursuits occurring in the progress of society. Lord Ellenborough carried the doctrine so far as to hold that an infant might be charged for regimentals sold him as a member of a voluntary corps, saying that in those perilous times (1804), when young men had enrolled themselves for the defense of the country, he should hold that clothes so furnished were necessities: *Coates v. Wilson*, 5 Esp. R. 152. We suppose an infant who had learned the trade of a carpenter, might be charged with a chest of tools necessary to do his labor as a journeyman; or a laborer with his pickaxe and spade. If the going to California to labor was, in view of the plaintiff's situation and condition in life, a reasonable and prudent step, it would be difficult to say that he might not be charged with the expenses of the outfit.

The plaintiff was desirous of engaging in this new field of labor. He had the assent of his father, to whom his services were due. To carry out this purpose, certain necessary expenses of outfit and voyage must be incurred. Not having means of his own, he enters into an arrangement with the defendants to furnish them, upon a special agreement indeed, but reasonable and beneficial in its terms. Viewing the contract in this light, or as an agreement for the services of the plaintiff for a limited time, to be repaid by the advancement and by retaining also two thirds of the fruits of his labor, it would, if fairly made and fully executed, be within the principles, if not within the direct authority of *Stone v. Dennison*, 13 Pick. 1.

In that case, the plaintiff, an infant over fourteen years of age, made an agreement with the defendant, his guardian assenting, by which he was to continue in the service of the defendant till he should arrive at the age of twenty-one, for his board, lodging and education; and it was held that the plaintiff, not having been overreached in the contract, and the contract not being so unreasonable in itself as to raise a suspicion of fraud, and having been fully executed on both sides, the

plaintiff could not, notwithstanding such agreement, maintain a *quantum meruit* for his services, by showing that in the event; as it happened, his services were worth more than the stipulated compensation. Indeed, to say that an infant could make no contract for his labor, however reasonable and beneficial to himself, by which he should be bound, even when fully executed on both sides, instead of serving as a protection to the infant, would have the effect only to prevent his being employed. Men of business want to know beforehand what they have got to pay, and also to know that when an agreement for labor, reasonable and just, has been justly made and fully executed and the price paid, there is an end of the matter.

If the contract set up by the defendants could, even after being fully executed, be rescinded, it seems to be conceded this could only be by putting the defendants *in statu quo*. If this includes, as seems to be obviously just it should, a fair compensation for the risk they necessarily incurred, the result would be only to come back to the starting point, the jury having found the agreement, under all the circumstances, a reasonable one.

In the case of *Moses v. Stevens*, 2 Pick. 335, cited by the counsel for the plaintiff, the contract had not been executed. The only question was, whether the doctrine of *Stark v. Parker*, 2 Pick. 267, should be extended to the contracts of infants. In *Stark v. Parker*, it had been settled that where one had contracted to labor for a fixed period, and for a price covering the whole period, the contract was entire, and the performance a condition precedent to the recovery. In *Moses v. Stevens*, it was held that this rule did not apply to the contracts of infants, but that an infant might rescind such contract and recover upon a *quantum meruit* for work done; yet the force of the contract was so far recognized as to allow the employer to deduct from fair wages whatever damage was sustained by the violation of his agreement.

In the later case, also, of *Vent v. Osgood*, 19 Pick. 572, the agreement had not been executed, nor was the contract shown to have been beneficial to the infant. Had the latter element been added, and the contract fully executed, the plaintiff having received his lay or share of the catchings, the case

would have been like that now under consideration, and so we think would have been the decision upon the principles stated in *Stone v. Dennison*. If the case of *Vent v. Osgood* were again to arise, the grounds upon which its decision is based might need reconsideration.

Exceptions overruled.

COTHEAL V. TALMAGE.

(9 New York, 551. Court of Appeals, 1854.)

¹**Liquidated damages for breach of contract.** Where the damages resulting from the breach of a prospecting contract are in their nature entirely indefinite and uncertain, and the prospector at the time of executing the agreement also gave a bond that in case he failed to keep his agreement he would pay \$500 as liquidated damages for the breach: *Held*, that such sum will be regarded, not as a penalty, but as the measure of damages, unless the amount be greatly disproportioned to any probable estimate of the actual damages.

Idem—Where it may count against one of several breaches. Such sum will still be treated as liquidated damages, although by the terms of the agreement it is to be paid on the breach of any one of several stipulations of different degrees of importance, when the damages arising from the breach of either of them would be in their nature indefinite.

Condition of penal bond. Where the provision for the payment of a fixed sum on the breach of an agreement is found in the *condition* of a bond containing a larger penal sum, the presumption is that the sum named in the condition was not designed as a penalty.

In December, 1848, the plaintiff entered into an agreement with a company of persons, of whom G. T. De Forest was one, by which, in consideration of the sum of \$100 paid to him by each of the individuals composing the company, the plaintiff agreed to furnish them with a cabin passage to San Francisco, with subsistence for a year, and with the articles and tools necessary for carrying on mining operations in California. On their part the company severally covenanted with the plaintiff that they would diligently devote themselves to obtaining gold and other precious metals, in the manner and under the superintendence and regulations specified in the agreement, a certain proportion of the earnings of each being

¹ *Hanson v. Boothman*, 2 M. R. 217.

agreed to be paid to the plaintiff; and that they would eventually execute a bond with an approved surety or sureties to the plaintiff, conditioned for the payment to him by the person executing the agreement and the bond, in case such person should fail to keep, or should break the agreement, of "the sum of five hundred dollars, as liquidated damages."

In pursuance of this agreement, and at the same time, De Forest, with the defendant as his surety, executed to the plaintiff a bond, commencing in the usual form, with a penalty of \$1,000. Then followed, after a reference in general terms to the agreement, this further recital and condition:

"And whereas it is agreed on the part of the above bounden Goyt T. De Forest, that in case he should fail to keep, or should break said agreement, there should be paid to said David Cotheal the sum of five hundred dollars, as liquidated damages; now therefore, the condition of this obligation is such, that if the above bounden Goyt T. De Forest and Daniel Talmage shall well and truly pay, or cause to be paid to said David Cotheal, his certain attorney, executors, administrators or assigns, upon the breach of said agreement as aforesaid, the just and full sum of five hundred dollars, without any fraud or other delay, then this obligation to be void, or else to remain in full force and virtue."

This action was commenced in the New York Common Pleas in December, 1849. The complaint stated the agreement and bond, and alleged a breach of the agreement on the part of De Forest in leaving the mineral district and refusing to devote himself diligently and exclusively to obtaining gold and other precious metals, pursuant to the articles, and claimed as damages the \$500 mentioned in the instruments referred to.

The defendant, in the fourth clause of his answer; denies that De Forest ever broke the alleged agreement, or refused to perform any covenant mentioned in the complaint, or left the mineral district referred to, or failed or omitted to devote himself diligently and exclusively to obtaining gold or other precious metals pursuant to the articles, "further or otherwise than as hereinafter stated." The sixth clause alleges specifically the performance of the agreement by De Forest for a certain length of time, and then states that after he had been

diligently and exclusively devoting himself to the obtaining of gold and precious metals, in pursuance of the terms of the agreement, for about seven weeks, the plaintiff, about October 11, 1849, by his own acts and procurement, and those of certain agents and servants, persuaded and induced De Forest and the other parties to the agreement to break up and abandon the enterprise. These allegations are denied by the reply.

On the trial, before Judge INGRAHAM and a jury, in June, 1851, it was held that the breach of the agreement was admitted on the pleadings, and no proof thereof was required from the plaintiff. A verdict was given for the whole amount claimed, and judgment upon the verdict was affirmed by the court at general term. The defendant appealed to this court.

N. HILL, Jr., for the appellant.

A. THOMPSON, for the respondent.

RUGGLES, J.

The only question necessary to be considered in this case is whether the sum of \$500 mentioned in the condition of the defendant's bond is a penalty to cover such damages as might be proved on the trial, or an amount liquidated and settled between the parties as the compensation to be paid upon the breach of the contract. The ablest judges have declared that they felt themselves embarrassed in ascertaining the principle on which the decisions upon questions like the present were founded: 2 Bos. & Pul. 350. They have said that the law relative to liquidated damages has always been in a state of great uncertainty; and that this has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves: *Crisdee v. Bolton*, 3 Car. & P. 240. Best, Ch. J., says in that case, that parties to contracts, from knowing exactly their own situation and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries; and that if a contract clearly state what shall be paid by the party who breaks it, to the party to whose

prejudice it is broken, the verdict in an action for the breach should be for the stipulated sum; that a court of justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages, than it has to decide contrary to any other of its clauses. It is conceded by all that courts are to be governed by the intention of the parties, to be gathered from the language of the contract and from the nature and circumstances of the case. Where there is a contract to pay money, the damages for its breach are fixed and liquidated by law, and require no liquidation by the parties. An agreement to pay greater damages is therefore regarded as a penalty. But when the damages resulting from the breach are uncertain in amount, as they are in all other cases, the parties have the right to say how much shall be paid by way of compensation to the party injured; and when they have settled that compensation, neither a court of law nor a court of equity will diminish its amount unless it be so grossly disproportionate to the actual injury that a man would start at the bare mention of it: 2 Bos. & Pul. 351. Where there is a manifest difficulty in ascertaining damages arising from a breach of the contract, and the fair conclusion is that the amount is specified and agreed on for the purpose of saving the expense or avoiding the difficulty of proving the actual damages, the parties should be held to their bargain; and especially where the amount fixed and liquidated is not far beyond what might probably be expected to arise from a breach of the contract. I am of opinion that the present is such a case. The parties had agreed to co-operate in a hazardous adventure, to be executed at a great distance from the place where the contract was made, in a country unsettled and without a regular government. The plaintiff was to make large advances for the transportation and supply of the company, of which De Forest (for whom the defendant was surety) was one. The success of the adventure depended on a strict and faithful performance of the contract by those who were engaged in it. The loss occasioned by the desertion or disobedience of any one of the company could not be supplied without great expense and delay, if at all. Great gains were undoubtedly expected by all parties from the enterprise, and great loss to the plaintiff was certain from its failure. United

action, subordination and obedience were indispensable to its success. The temptations to desertion and disobedience in California were many and strong. We know from the history of the country that military and naval subordination were broken up by those temptations. Without stern and stringent provisions in the articles which bound the company, no reasonable expectation could be entertained that they would remain united. It was necessary for the interest of each that all should be bound by such provisions. From the nature and object of the adventure, the amount of gain by a strict performance of the contract could not be foretold, and the amount of loss by a breach could not be ascertained by proof; and if it had been susceptible of proof in that country, the expense and difficulty of obtaining it here would have rendered a contract to pay unliquidated damages of no value. The liquidation of the damages by contract between the parties was therefore prudent and reasonable on all sides. Without such a provision the plaintiff would have had no real or substantial security for his advances, and without it the contract would probably never have been made. There is nothing in the case to authorize us to say that the probable damages were unreasonably estimated at \$500. It is probably less than all parties expected the plaintiff would gain by the adventure from the services of each individual, provided the enterprise was faithfully prosecuted by all; and whether the payment of this sum by each delinquent of the company will indemnify him for his loss, we have no means of ascertaining from the case. Under these circumstances, it seems to me that the intention of the parties to the bond was to bind themselves to the payment of the sum mentioned in its condition in case of a breach of the agreement.

But it is contended that because the contract referred to in the bond bound the defendant to do several things of different degrees of importance, and the sum of \$500 was made payable for the non-performance of any or either, it must be a penalty, and not liquidated damages. This doctrine, in the cases in which it is asserted, is traced to the cases of *Astley v. Weldon*, 2 Bos. & Pul. 346, and *Kemble v. Farren*, 6 Bing. 141. But I do not understand either of these cases as establishing any such rule. The principle to be deduced from them is.

that where a party agrees to do several things, *one of which is to pay a sum of money*, and in case of a failure to perform any or either of the stipulations agrees to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty, and, being a penalty in regard to one of the stipulations to be performed, is a penalty as to all. In *Kemble v. Farren*, Tindall, Ch. J., says, that if the clause fixing the sum for liquidated damages "had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have the effect of ascertaining the damages upon any such breach," thus rejecting the doctrine contended for by the defendant's counsel in the present case. It is true that the doctrine thus contended for has been adopted in some English and in several American cases; hastily, I should think, and without a careful examination of the cases from which it is supposed to be derived. But if it should be considered as having any solid foundation in principle, it should be applied only in subordination to the general rule, which requires the courts in these, as in all other cases, to carry into effect the true intent of the parties. It should never be applied to cases like the present, where the amount of damages is uncertain from the nature of the subject itself, and incapable of proof, not only from that uncertainty, but from the circumstances of the case already stated, and where for these reasons there was a necessity for ascertaining them by estimate, by the parties in their contract. The only plausible ground for withholding the doctrine in any case is, that the party might be made responsible for the whole amount of damages for the breach of an unimportant part of his contract, and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained by the other party. Without undertaking to deny that this rule may be properly applied to some cases, I can not think it ought to be applied to the present. The injustice which it professes to avoid is no greater than that which is tolerated in many other cases for the purpose of enforcing a faithful performance of contracts. A laborer, for instance, who agrees to work by the month or by the year, his wages to be paid at the end of the term, loses by our law the fruits of his toil, if he fails in his last day's work; and a farmer who contracts to deliver to a merchant one hundred tons of hay,

for which he is to be paid when the whole is delivered, and delivers ninety-nine tons, but fails in delivering the last load to make up the quantity, can recover for no part of what he has delivered. If the rigor and severity of this rule can be justified, we shall have no difficulty in reconciling our minds to the propriety of holding that the surety for De Forest is responsible in the specified amount of damages for the non-performance of his contract, and in declining to relieve him from the consequences of a breach to which he made himself liable by his bond.

Again, this is an action upon a bond in the penalty of \$1,000, conditioned to pay \$500 in a certain event therein mentioned. In *Fletcher v. Dyche*, 2 Term R., 32, Buller, J., says: "Where there is a penalty in a bond, it is strange that the sum mentioned in the condition should be called a penalty." And Lord Eldon, in *Astley v. Weldon*, says it would have been absurd to say that the sum mentioned in the condition of a bond and secured by a penalty should itself be regarded as a penal sum. See *Smith v. Smith*, 4 Wend. 468. Whether we look to the form of the defendant's contract, to the nature of his engagement, or to the circumstances in relation to which it was made, we find the intention of the parties was, that the sum expressed in the condition of the bond should be paid for a breach of De Forest's contract. The jury having found it broken, we think the judgment of the court below should be affirmed.

ALLEN, J., concurred in the above opinion, but thought a new trial should be granted, on the ground that the court below erred in holding that the breach was admitted.

All the other judges concurring:

Judgment affirmed.

¹ HOYT ET AL. V. SMITH ET AL.

(23 Connecticut, 177. Supreme Court of Errors, 1854.)

Time fixed by context of contract. Defendant Smith agreed with plaintiffs in consideration of a fund in money advanced, to sail for California, to forward provisions for two years and tools for digging gold, and to commence digging as soon as possible on arrival, and remit to plaintiffs one fourth of the proceeds: *Held*, that the contract bound him to dig for gold for the full period of two years.

Prospector embarking in other business obliged to a discovery. Upon bill for an account filed, alleging that defendant Smith had procured large sums either by digging gold or by the use of the funds of plaintiffs, which sum he had fraudulently shipped to defendant Newman, Smith answered, stating that he had abandoned digging for gold, but refused to answer interrogatories as to what gold he had otherwise obtained during the period of two years called for in the contract: *Held*, that he was bound to make full disclosures of what he made and of what business he was engaged in, so that upon knowledge of the facts the court could say whether the money was realized by digging gold or procuring others to dig for him, or through an investment of the funds advanced him, or otherwise.

Bill in equity, brought by Stephen B. Provost and others, against William L. Smith and William Newman, for discovery and relief.

The bill alleged that said Smith, on the 22d day of January, 1849, executed and delivered to the plaintiffs and to said Newman, the following agreement in writing:

"This is to certify that I have received from Silas Schofield, Jr., and George Schofield, five hundred dollars; from Stephen B. Provost, J. D. Warren, William Newman, John R. Schofield and James H. Hoyt, one hundred dollars each, making in all one thousand dollars. In consideration of the foregoing sum of one thousand dollars, I will, on or about the first of February next, sail for California, by way of Chagres and Panama, in a steamship, and I will forward to California a sufficient quantity of provisions to last two years, and will procure and forward to California all necessary tools for digging gold, and will commence digging as soon as possible after my arrival there, and forward, every opportunity, to the fore-

¹ S. C., *post*. 315, 321 325.

going named persons, any amount I may have on hand, they to receive one fourth part of the amount that I can collect while there, and the remaining three fourths to be kept by them for my use, and subject to my order ; and for the further consideration of the one thousand dollars received, I will procure a policy upon my life, for the sum of two thousand dollars, in favor of James H. Hoyt, and in case of my death before my return home, he is hereby directed and authorized by me to collect the money for the policy, and pay over to the foregoing named persons, one thousand dollars, in proportion to the sums received of each, and the remaining part to be paid over to William Newman, for the use and benefit of my children ; and in case the policy of insurance is kept good for more than one year, I will pay one half the expense, and the foregoing named persons pay the other half, each in proportion to the sums entitled in the policy, in case of my death. (Signed) Wm. L. Smith."

That in pursuance of the provisions of said agreement, the plaintiffs and said Newman delivered to said Smith said sum of one thousand dollars. On the 29th day of January, 1849, they delivered to the said Smith the further sum of two hundred dollars for the same purposes ; that said Smith by said agreement promised the plaintiffs and said Newman that he would, on or about the first day of February, go to California, and procure and convey thither a sufficient quantity of provisions to maintain him in California for two years from said time, and would procure and convey to California all necessary tools for digging and procuring gold in the gold mines and deposits in California, and that he would devote his time and services, during two years, to the digging of gold, and would forward, by every opportunity, to the plaintiffs and said Newman, all the gold which he should procure and collect while there, to be disposed of as specified in said agreement ; that said Smith went to California, according to the terms of said agreement, and with him took the necessary provisions and tools, as specified in said agreement, commenced digging gold, and forwarded to the plaintiffs, gold of the value of twelve hundred dollars ; but, soon after the arrival of said Smith in California, he conceived the design of depriving the plaintiffs of the benefit of his said agreement ; that he and said

Newman fraudulently conspired and combined together to carry said design into effect; that Smith remained during said two years, in California, but wholly neglected and refused to fulfill his agreement aforesaid, either by neglecting and refusing to devote his time and services to digging gold, or by neglecting and refusing to forward to the plaintiffs and to said Newman, for the benefit of the plaintiffs and defendants, the gold procured by him in California, as specified in said agreement; that said Smith, at all times, wholly refused to give to the plaintiffs any account of his proceedings in California, though often requested so to do; that they had reason to believe, and therefore averred, that said Smith procured a large amount of gold in California during said two years, to wit, twenty thousand dollars, and that he either procured said gold or might have procured it, by digging gold, and that he procured said gold by the aid of the money advanced under the provisions of said agreement. The bill further alleged that said Smith, and Newman, who was the brother-in-law of said Smith, fraudulently combined together to conceal the gold so obtained, from the plaintiffs, and that Smith transmitted to Newman the whole or a large part of the gold procured by him, which the latter received, apparently for his own use, but in reality for the benefit of said Newman and Smith.

The plaintiffs prayed the court to order Smith to render an account of all the gold and other property which he obtained during said term of two years in California; and prayed that said Smith be required to disclose under oath, what amount of gold or other property he obtained during said two years in California; and particularly to state when he arrived in California; when and where he commenced digging for gold; how much gold he obtained at such place of digging; when, if at all, during said two years, he left off digging at that place, and commenced digging at some other place; what such other place was, and how much gold he procured there; at what other places, if any, he dug for gold, and what he procured at each; also to state in what manner he employed his time during said two years, and how much gold, or other money, or other property, he obtained during said two years; also to state whether, while in California, he transmitted gold, money, drafts or other property to said Newman, and if so, when, how much,

and in what manner; also to state what amount of gold, money drafts or other property he brought with him from California; and in what it consisted, and how much of it was obtained during said two years, and if he had transmitted or delivered to said Newman or to some other person for him, gold, money, drafts, or other property for his own benefit, or for the benefit of himself and said Newman; and if so, how much and in what manner, and in what situation the same then was.

That said Newman be required to answer and state what gold, money, drafts, or other property was, at any time, transmitted to him or to any other person for him, by the said Smith while in California, and what he had done with the same; also what gold, drafts, money or other property the said Smith had, since his return from California, delivered to him or any other person for him; what arrangement or understanding existed between said Smith and him as to the gold and other articles so transmitted or delivered, as to what he should do with the same, or in what manner he was to account for the same to said Smith; what said Newman had done with any gold, money or other property so received; and what was the state of the account between him and said Smith; also to state what correspondence passed between him and said Smith while said Smith was in California, and produce all letters which he received from said Smith, or state their contents, if said letters had been lost or destroyed; also to state particularly all other matters relating to gold or other property received by him for said Smith since he left for California, as fully as if particularly interrogated.

The plaintiffs further prayed that the defendants might be required to render full account of all moneys received by them or either of them, for the benefit of the plaintiffs, or for the mutual benefit of the plaintiffs and defendants, or either of them, and to pay to the plaintiffs such moneys as might be due to them or either of them.

To this bill the defendants answered severally; said Smith denied that he made any other promise to the plaintiffs, or any of them, than that set forth in their bill, and averred that he went to California, taking with him provisions and everything else said writings required him to take, and commenced digging gold, and sent to the plaintiffs gold, as in said petition

alleged; that he continued for a long time, viz., from ——— to ———, to search and dig for gold in California, but notwithstanding his utmost exertions, he procured but a very small quantity, and not enough to pay for his expenses while engaged in so searching and digging; that he found all further efforts and exertions for the procuring of gold in California by digging therefor unavailing and hopeless; that with the knowledge and approbation of most of the plaintiffs, he discontinued such digging, being convinced that further search and digging for gold would have been attended with constant and ruinous loss, unproductive of any favorable results, and would have so impoverished him, as to render it impossible for him to have refunded to the plaintiffs the money he had so received from them, or any part thereof, and that he procured by his exertions and labor no gold to forward to the plaintiffs and said Newman, and could not procure any for that purpose. But nevertheless he did return and forward to the plaintiffs, viz., on or about the ——— day of ———, the moneys he had so received from them, and interest thereon from the time he so received the same; that in all respects, and with entire fidelity, he discharged his duties to the plaintiffs under said contract, to the utmost of his power; that he always had been and was ready to render to the plaintiffs his just account in the premises, and that he had at all times, when in any way requested, given them true and full information in relation to the matters aforesaid, and was willing and ready to make full disclosures under oath, of all matters relating to the premises, and to answer all inquiries properly and legally pertinent to the same.

Said Newman denied that he had ever received anything from said Smith for which he could account to the plaintiffs, or anything in which the plaintiffs had any interest, direct or indirect; yet averred that he was ready and willing to render to the plaintiffs any such account, if there be any such account to be rendered, which he denies, and he was ready and willing to disclose on oath, any and all matters, and to answer all inquiries properly and legally pertinent to the same. Both defendants utterly denied all the allegations of said bill charging them with fraudulent combination, or with fraud, or with concealment, or omission of any kind to discharge any duty in the premises.

At the term of the court holden in February, 1853, a committee having been appointed to take the discovery of the defendants, reported that the defendants made discovery substantially as follows:

Said Smith, in his discovery, after stating that he was willing to disclose as to the amount of gold or other property he obtained by digging in California, or any other operation under the contract, but not as to anything he obtained in any other way, disclosed as follows: "I arrived in California the first day of April, 1849. I commenced digging on the South Fork of the American River. I can not tell how much gold I obtained at that place of digging; I kept no account of it; about enough to buy my provisions. I left off digging at that place about the first of May in the same year. We started from there and went to the Middle Fork of the same river."

He then proceeded in detail to state his proceedings in gold digging in various parts of California until his return to Sacramento, which were unsuccessful; said discovery then proceeded as follows:

"This must have been about the first of December, in 1849, and was the last I ever did under the contract. I then went to work for a man building a house in Sacramento." Said Smith here declines to state, under the advice of his counsel, what other business he followed after he left off gold digging. He also declines stating what gold, money, or other property, he obtained after that period by following other business.

"I never sent to William Newman, of Stamford, nor to any body else, any gold, money, drafts, or other property obtained by digging, under the contract."

Said defendant here declines to answer, by advice of counsel, whether he transmitted to Newman any gold, money, drafts, or other property obtained in any other way than by digging, or under the contract, or when, or how much, or in what manner he so transmitted any such gold, money, drafts, or other property, if he ever transmitted any.

"I brought home no gold, money, drafts or other property from California obtained by digging, or under the contract, according to the construction given to that contract by myself and my counsel."

Said defendant declines, by advice of counsel, to answer what

amount of gold, money or other property he brought home with him, which was obtained in any other way than by digging or under the contract.

"I have never transmitted to or delivered to said Newman or to any other person for him, any gold, money, drafts or other property, for my own benefit or for the benefit of myself and said Newman, obtained by digging or under the contract, and I decline to answer as to any property obtained in any other way, by advice of my counsel; and as to so much of the interrogatory as is embraced in these words, 'and if so, how much and in what manner, and in what situation the same now is,' if any was transmitted or brought by me, I also decline to answer, by advice of counsel, except to state as I have already stated, that none was brought or transmitted, obtained by me by digging, or under the contract."

Reservations similar to those made by said Smith were made in the discovery of said Newman.

The case embracing the foregoing facts was reserved for the advice of this court.

DUTTON, FERRIS, and MINOR, for the plaintiffs.

HAWLEY, for the defendants.

HINMAN, J.

We think the defendants are bound to answer the interrogatories which are propounded to them. They do not deny the right of the plaintiffs to call for a full disclosure in respect to all gold obtained by Smith by digging during the time he was in California, at work under the contract, but they claim that the contract did not bind him to dig for gold during any particular time, and that if it did, they have no right to compel him to account for gold obtained in any other way than by digging; that if he disregarded his contract he is only liable in damages in an action at law, and not to account for any money he might have obtained in any way not contemplated in the contract.

We think, however, that the contract did bind him to dig for gold for the period of two years at least. It is true that

the contract does not say in express terms that he would dig for gold for two years, but it shows that a large sum of money was advanced to him to enable him to procure the necessary tools and provisions, and in consideration of that advancement, he agrees to procure a sufficient quantity of provisions to last two years, and also to forward all necessary tools for digging gold, and to commence digging as soon as possible after his arrival there. From these circumstances we have no doubt that all parties contemplated that he was to be engaged in this business for two years at least. Now, although it may be true that the plaintiffs may have no right to call for an account of any gold or other property obtained in any other way than by digging, yet they have a right to know how much gold, and at what places he obtained such gold as he did obtain in that way; and we do not think that they are bound to take his simple statement of what he considers the amount of gold he obtained in that way. They have a right to a disclosure of all the circumstances that may enable a court to determine whether he procured his gold by digging or in some other way. It is very possible that the court, on a full disclosure of all his conduct relating to the procurement of gold, might differ from him in respect to the manner in which he procured it, and might think it was procured by digging; and for the purpose of testing the correctness of his opinion, we think the plaintiffs are entitled to know what he was about during the two years that he ought to have been engaged under the contract. The bill states that he in some way obtained and sent home to the defendant, Newman, large sums of money; and it charges that it was either procured by digging or by the use of the funds of his associates, the plaintiffs, which were furnished him for the purpose of procuring tools and provisions. If this was so, he ought to account for it; and a mere simple denial of the fact is not, we think, a satisfactory answer to the call made upon him in this bill. He says, in the partial disclosure which he makes, "that he brought home no gold, money, drafts or other property, from California, obtained by digging, or under the contract, according to the construction given to that contract by himself and his counsel;" and in another place he says, "he never sent to anybody any gold, etc., obtained by digging, under the contract."

Now, by this answer, he constitutes himself the sole judge of what he obtained by digging, or under the contract, and attempts effectually to prevent the plaintiffs from investigating the matter at all. He does not deny that in some way he obtained large sums of money, which he either sent home to Newman, or brought home himself. His conduct in refusing to answer what sums, and how they were obtained, raises a strong suspicion, to say the least, that they were obtained in some way which would make him accountable to the plaintiffs for a share of them. Suppose he abandoned digging for gold himself, but employed others to dig with the funds furnished him by the plaintiffs, would he not be accountable to the plaintiffs for a share of the avails? Or, suppose he invested the plaintiffs' money in some other business, and thus obtained large profits, might he not be accountable for money thus obtained? We think he has no right to constitute himself, or his counsel, a judge of his own accountability, and then refuse to answer questions because he thinks they relate to matters into which the plaintiffs have no right to inquire.

He ought to relate all the facts as fully as if he were under examination as a witness, and the court will determine from them whether he is accountable or not.

The last two questions reserved for the advice of the court of errors, we have thought it best, upon the whole, not to answer until the facts are all before the court. They may never require to be answered at all, and they have not been very fully argued by counsel. When the facts are all brought out the question will be cleared of some embarrassments with which they are now necessarily attended.

In this opinion the other judges concurred.

HOYT ET AL. V. SMITH ET AL.

(27 Connecticut, 63. Supreme Court of Errors, 1858.)

Gold digging contract construed. A contract requiring a party to dig gold during a certain period, can not be construed to require the party making such agreement to account for money earned during the period called for in the contract in other business.

Bill in equity. The material facts of the case as reported by a committee, are as follows:

On the 22d of January, 1849, William L. Smith, one of the respondents, executed and delivered to the petitioners and William Newman, the other respondent, the following agreement:

"This is to certify that I have received from Silas Scofield, Jr., and George Scofield, \$500; from Stephen B. Provost, J. D. Warren, William Newman, John R. Scofield and James H. Hoyt, \$100 each, making in all \$1,000. In consideration of the foregoing sum of \$1,000 I will on or about the first of February next sail for California by way of Chagres and Panama in a steaⁿship; and I will forward to California a sufficient quantity of provisions to last me two years, and will procure and forward all necessary tools for digging gold, and will commence digging as soon as possible after my arrival there, and forward, every opportunity, to the foregoing named persons, any amount I may have on hand, they to receive one fourth part of the amount that I can collect while there, and the remaining three fourths to be kept by them for my use and subject to my order.

(Signed) WILLIAM L. SMITH."

The following receipt was afterward annexed to the foregoing contract by Smith:

"\$200. Received, Stamford, January 29, 1849, from each person named in the foregoing agreement, 20 per cent. on the amount received from each, making \$200, on the same terms and for the same purpose as specified in the foregoing agree-

¹ S. C., *ante*, 306; *post*, 321, 325.

ment signed by me on the 22d day of January, 1849; and if it should be that I have no occasion to make use of this sum of \$200, then I am to return the same to each person named in the foregoing agreement in proportion to the sum paid by each.

WILLIAM L. SMITH."

The petitioners and Newman paid to Smith the sums specified in these agreements, amounting to \$1,200. Smith thereupon procured the articles specified in the agreement, and shipped them to San Francisco, and soon afterward went to California and commenced digging for gold in the mines. He continued digging at various places until about the 1st of November, 1849, and obtained thereby a considerable quantity of gold. During that time he occupied himself diligently and fairly under his agreement, but was not very successful, and became satisfied that he could not further pursue the business of digging for gold with profit to himself or to the other parties to the agreement; and about the 1st of December, 1849, he abandoned the business and went to San Francisco with the intention of there engaging in some other employment. At the time of his arrival there he had expended for necessary purposes, or lost without fault, all or nearly all the gold which he had previously obtained by digging. Early in January, 1850, he commenced the business of a lighterman in San Francisco and continued in that business about a year, at the end of which time he left California and returned to Stamford. In his business of lighterman he made about \$9,000, which sum he either sent home or brought home with him.

When he commenced his business of lighterman and for a considerable time afterward, he, as well as the petitioners, considered that the contract was still in force, and that he was still acting under it, and that the avails of his labor and business were to be divided among the parties to the contract. About the time when he commenced this business he wrote to Hoyt, one of the petitioners, informing him of his change of occupation and of his reasons for making it; which reasons were made known to the other petitioners. Hoyt replied, assenting to the change.

Afterward Smith, in the summer of 1850, sent a large amount of funds to Newman, the other respondent, being

part of the avails of the lightering business—the sending of which by Smith and the receipt thereof by Newman were designedly concealed by them both from the knowledge of the petitioners, with intent to prevent them from learning that Smith was successful in his new business, and from claiming or obtaining from him any share of its profits. In the autumn of 1850 Smith paid to the petitioners the sum originally advanced to him by them, with interest to the time of the payment.

The petition alleged a conspiracy between Smith and Newman to defraud the petitioners, and prayed for a disclosure and an account. The case on the above facts was reserved for the advice of this court.

FERRIS and MINOR, for the petitioners.

HAWLEY and LOOMIS, for the respondents.

STORRS, C. J.

If, by the true construction of the agreement set out in this bill, the defendant Smith was required to labor in California, not generally, for himself and the other parties to that agreement, but only in the particular business of digging gold, it is quite clear on the finding of the committee, nor has it been controverted, that on the settlement of the account between those parties in relation to that business, no balance is due from either of the defendants to the other parties to the agreement, because it is found by the committee that Smith seasonably went to the gold mines and commenced digging for gold, and that he worked diligently in that business for a period of more than six months, and until, as the report of the committee fairly imports, he could not further pursue the business with profit to himself or the other parties to the contract, when he discontinued the business and went to San Francisco with the intention of finding and engaging in some other business; before or upon his arrival at which last mentioned place he had necessarily expended, or lost without fault on his part, the gold which he had obtained by digging. It appears also from the report that Smith has

paid to the petitioners the sum originally advanced to him under the agreement, with interest thereon to the time of such payment, which amount, however, was obtained by him, not while occupied in the business of digging gold, but from that of lightering, in which he subsequently engaged; and it is not found that in the business of lightering, or any other than that of digging gold, in which he engaged, he employed or used, either any of the moneys originally advanced to him under the agreement, or those which had been acquired by him in the business of digging gold; or, if that would have laid the foundation for an account on this bill, that it would have been practicable for him to continue in the latter business profitably to himself or the other parties to the agreement; hence it appears that Smith has fully accounted to the plaintiffs for the sums originally advanced to him by the latter, and for the gold obtained by him while engaged in digging, under the contract; and it is not shown that it was in his power to earn more in that particular business, or that he used any of the moneys so advanced to him in any other occupation; and these embrace all the grounds on which the plaintiffs claim that, on the construction of the contract which has been supposed, the defendants are liable to account, either for the gold which was procured by digging, or for its avails in consequence of the subsequent use or disposition of it.

The plaintiffs, however, claim that, by the just construction of the agreement, Smith was bound to go to California, and remain there two years in the service of the plaintiffs and Newman, generally, and in any kind of business which promised to be profitable to them, and not merely in the particular business of digging gold; and that therefore he is liable to account for the avails of the business of lightering in which he was engaged during a part of that time. In regard to this claim it is quite clear that unless the agreement recited in this bill, on its face and independently of any extrinsic evidence to explain its meaning, should have the construction which the plaintiffs thus attached to it, they are not entitled to any relief in this case founded on such a construction, because the promise of Smith alleged and described in the bill, is only that he would proceed to California, and devote his time and services, during the two years he was to remain

there, to the particular business of digging gold, and forward, as opportunity should present, to the plaintiffs and Newman, all the gold he should so procure and collect while there—and there is no averment that he agreed to engage or be accountable for what he should procure in any other kind of business. Such being the contract alleged and relied on throughout in the bill by the plaintiffs, it would clearly not be supported by, and consequently would not lay the foundation for any relief upon, the construction for which the plaintiffs now insist. And if it should be conceded that that is the true construction of its terms, it is, to say the least, very questionable whether in this case its meaning could be extended beyond that which properly attaches to it as set forth in the bill, and relief granted on the ground of such an extended construction.

But the agreement recited in the bill is not, in our opinion, fairly susceptible of the meaning claimed for it by the plaintiffs. Such a construction of the phrase "digging gold," which is used in those instruments to designate the business in which Smith was to be employed, is not agreeable to the literal and proper meaning of that expression, or to the sense in which it is popularly or ordinarily used. It is true that it is susceptible of a figurative meaning, and is sometimes used in this manner to signify generally any mode by which wealth or property is obtained, of which a fine illustration is given by the great lyrical poet of England in his version of the 39th psalm:

Some walk in honor's gaudy show,
Some dig for golden ore.

But it is quite uncommon for parties to contracts to couch them in figurative or poetical language, and we should hardly expect to find words used in such a sense rather than in their ordinary and proper meaning, to describe in a contract respecting the employment of one of them, the particular kind of business in which he was to serve. If, however, the phrase in question had acquired by common use such a figurative or peculiar meaning, it would perhaps be competent and proper for the court to give it such a signification, as was done in *Hoare v. Silverlock*, (12 A. and E. N. S. 624,) where it was held that, in an action for defamation, the court might, especially after verdict, take the phrase "frozen snake" to imply,

without explanation or innuendo, an imputation of treachery or ingratitude, on the ground that such a meaning of the words had passed into common use. But the expression we are now considering has not acquired in common parlance any other than its proper and literal meaning; nor is there any language connected with it in the instrument in question to show that it was used in any other than that sense. On the contrary the stipulation that Smith would procure and forward to California, a region then remarkable principally, and indeed almost exclusively, for its production of gold, all necessary tools for digging that metal, in connection with what immediately follows in the same sentence, and as an addition to it, that he would commence digging as soon as possible after his arrival there, places it beyond all doubt that the phrase in question was used in its literal and proper sense, and that he was to be confined to the business of procuring gold by digging alone; and one of the phrases in the instrument on which the plaintiffs rely to show that they were intended to be used in a looser, more extensive or figurative sense, rather strengthens than weakens the construction which we have adopted, while the other phrase relied on is entirely compatible with it, and therefore does not aid the plaintiffs.

In regard to the conduct or declarations of the parties which have been alluded to as showing their understanding of the meaning of the contract, they might be proper for the consideration of the committee whose province it was to find the facts in the case, in determining from the evidence before them, extrinsic of the instrument, what the parties intended by the language they used, provided the allegations in the bill rendered such evidence relevant; but there is no finding on that subject, and it was for the superior court, as it is for us, only to decide the case on the facts found by the committee.

We therefore advise that the bill should be dismissed.

In this opinion the other judges concurred.

Bill to be dismissed.

¹HOYT ET AL. V. SMITH ET AL.

(27 Connecticut, 468. Supreme Court of Errors, 1858.)

Amendment showing consideration for prospector engaging in other business. The Supreme Court having advised the dismissing of the bill in this case (*ante* 320) because the contract on which an account was sought called for the business of gold digging only, the complainant asked to amend by charging that the new business was engaged in in consideration of defendant being released from his agreement to dig for gold, which leave to amend was allowed; it was *held*, that such amendment was proper; that the subject-matter of the bill as well as the parties remained the same, and that delay was no reason for refusing to allow the amendment when such delay had been caused by the refusal of defendants to make timely disclosures under the interrogatories originally filed.

Bill in equity. The facts of the case are fully stated in the report of a former hearing of the same case, *ante* page 315. It will be seen that this court there advised that the bill be dismissed for the want of any averment as to moneys obtained by the defendant Smith in any other business than that of digging gold, while by the report of the committee it was found that he had acquired no moneys in that mode, but a large amount in the business of lightering, during the two years covered by the contract with the petitioners. At the term of the superior court next following, the defendants moved that the bill be dismissed in accordance with the advice so given. The petitioners at the same time moved to amend by inserting the following allegations, with sundry minor amendments to adapt the bill to them:

“That when in California as aforesaid, viz., on or about the 1stst day of December, 1849, the said Smith, having become satisfied that he could no longer pursue the business of gold digging with profit to himself or the petitioners, afterward, viz., on or about the 1st day of January, 1850, so informed the petitioners; and that it was thereupon then and there understood and agreed by and between said Smith and the petitioners that the said business of gold digging, as contemplated

¹S. C. *ante*, 306, 315; *post*, 325.

in and by said agreement in writing might be abandoned, and that his time and services thereafter, during the remainder of said term of two years, might and should be devoted to such other business in said California as would prove profitable to himself and the petitioner, and particularly to the business of lightering in said California; and that all the gold and moneys collected and procured by him in such other business, and particularly in said business of lightering, during said remainder of said term, should belong to and be divided between said parties in the same manner and proportions as specified and set forth in said agreement in writing; and that said Smith, pursuant to such understanding and agreement did, on or about the 1st day of January, 1850, commence the said business of lightering, and continued therein during the remainder of said term."

The respondents objected to the allowance of the amendment as introducing a new cause of action, and as therefore one that could not be lawfully made, and on the ground that it ought not to be made, at so late a stage of the proceedings. They also claimed that it was the legal duty of the superior court to follow the advice of this court and dismiss the bill. The question thus made, with the question as to what cost should be paid by the petitioners if the amendment should be allowed, were reserved for the advice of this court.

DUTTON and MINOR, with whom was FERRIS, for the petitioners.

HAWLEY and LOOMIS, for the respondents.

HINMAN, J.

In the recent case of *Camp v. Waring*, 25 Conn. 520, it was held by this court that it was competent for the superior court, in its discretion, at any time before the passing of a decree in the case, to allow any proper amendments to a bill in equity to be made by the plaintiff, and therefore that such amendments are not precluded by the report of a committee in the case. This decision must, of course, narrow the inquiry in this case to the questions whether the amendments proposed to be made are proper, and whether, under the circum-

stances of the case, they are offered at so late a stage that the court ought not now to exercise its discretion in the allowance of them.

First, then, are the proposed amendments proper in themselves, so that they would have been allowed had they been offered soon after the commencement of the suit. The original bill calls for an account of the service and earnings of the defendant Smith, while he was in California digging for gold. It states that having been fitted out at the expense of the other parties, he went to California under a contract to remain there for two years, and to employ himself in digging for gold for the joint benefit of all the parties to the bill. It is now claimed that while he was in California he also engaged in the business of lightering, by means of which he realized large profits, under such circumstances as to render him accountable therefor upon the same terms that he would have been accountable had he exclusively devoted his services to gold digging.

Now, assuming, as we must at this stage of the case, that the plaintiffs are able to make out by proof such a case as they claim in their bill, if amended, it seems hardly to admit of a doubt that it is not only proper for the plaintiffs to call for an account for the whole time Mr. Smith was engaged in business on his and their joint account by one bill, but when they first instituted proceedings against him, it was their duty to do so, if they then had possession of the facts which they now propose to introduce into the case. The parties are the same, all being interested both in the gold digging and in the lightering business, and there being no others than the original parties who had any interest in either business. Indeed, his whole employment in California may fairly enough be considered as having been pursued under the same contract; for although the business of lightering was not contemplated when he went there, and was not therefore provided for in the original written contract, yet the parties at any time could vary or alter the terms of their contract at pleasure, or, if they saw fit, they could abandon it altogether; and while the defendant, Smith, was in California, and other parties here, we should not expect that any such alteration would be evidenced by any formal written instrument. The execution of such an

instrument would hardly be practicable, and the ordinary evidence of such an alteration we should expect to find in the correspondence between the parties, and inferences to be drawn from it and from the conduct of the parties themselves.

Now, whether the plaintiffs can make out their case on the amended bill it is not our province now to determine. It is sufficient that we see enough from the facts already disclosed to justify the plaintiffs instituting proceedings, and that the facts which have been brought out since the bill has been pending, seem to furnish reasonable ground to ask for relief upon a bill which will entitle them to it if they can establish the new facts which they propose to set up.

To justify the amendments, however, it is perhaps not enough that they should be such as might have been included in the original bill. However this may be, we think those offered in this case are very proper to come in as amendments. The present bill calls for an account of the avails of Mr. Smith's services for two years while in California digging for gold. The amendments only vary the claim by making it more general in respect to his employments in California. But in both the original and the bill as it will be if amended, the substance is the same, a claim for an account of the avails of two years' services while engaged in business for the joint benefit of the other parties to the bill. The amendments certainly do not change the ground of recovery to a greater extent than was allowed in the case of *Nash v. Adams*, 24 Conn. 33, which is a stronger case than this, inasmuch as that was an action at law, in which amendments are, by statute, more restricted than in bills in equity.

But, secondly, are the amendments offered at so late a day that they ought not now to be allowed? The case, it is true, has been a long time pending, but the delay has been chiefly caused by the defendant. Their first answer, made in February, 1853, was so imperfect that the plaintiffs were compelled to file new and more specific interrogatories, many of which the defendant Smith refused to answer until forced to do so by the court. During all this time that the plaintiffs were struggling to obtain information in respect to Smith's employments in California he certainly ought not to complain of the delay, or offer it as any ground of objection to the allowance of the

amendments. Indeed, it was not until the report of the committee, in August, 1857, that the plaintiff was able to get the facts which they now wish to incorporate into the bill. Before that time we think they are not chargeable with any delay. But at that time they had all the information which they have now, and we think they ought then to have made their motion to amend. They, however, chose to try their right to recover upon the original bill, and for that purpose went a second time to the Supreme Court of Errors with their case. Perhaps, in ordinary cases, amendments ought to be made before the report of a committee, as a matter of discretion; but such a rule will not apply to a case where the facts necessary to amend can only be obtained at the hearing, particularly where they are facts within the knowledge of the opposite party, and which his relation to the plaintiffs demanded that he should voluntarily have given to his employers.

We think, therefore, that the bill should not be dismissed, but that the amendments should be received and allowed on the payment of reasonable costs accruing since the report of the committee, and so we advise the superior court.

In this opinion the other judges concurred.

Amendments allowed.

¹ HOYT ET AL. V. SMITH ET AL.

(28 Connecticut, 466. Supreme Court of Errors, 1859.)

Rehearing after bill amended. The extent to which a rehearing shall be allowed after a bill is amended is a matter resting wholly in the discretion of the trial court.

Consent to change of business. Where a party, who had engaged to dig for gold for the benefit of himself and the outfitting adventurers, engaged in other business during the period during which he was bound to be mining, with the consent of the outfitters to his quitting the mines and embarking in other business: *Held*, that such consent was a sufficient consideration for the promise of such party to account for the profits of such other business.

¹S. C. *ante*, 306, 315, 321. For analysis of the four appeals in this case, see Morrison's Mining Digest, p. 298.

Defendant refunding to co-defendant after suit brought. Where a defendant charged with receiving funds from a co-defendant for the purpose of defrauding the plaintiffs, after the suit had been begun repaid these funds to his co-defendant from whom he had received them: *Held*, that such payment could not save him from a decree requiring him to pay the full amount to the plaintiffs.

Costs, in equity, are discretionary, and ought to be left to the action of the trial court.

Bill in equity. The facts of the case are stated in former reports of it, 27 Conn. 63, 468. The superior court having, under the advice of this court, allowed certain amendments which are stated in the latter report of the case, the plaintiffs moved for a decree in their favor, claiming that the new allegations of the bill had already been found to be true by the committee upon evidence, received at the time of the hearing without objection. The defendants filed a further answer, denying the allegations of the petition, and claimed that a full rehearing of the case upon the facts in issue should be allowed, or, if not a full hearing, yet a hearing upon all the new allegations of the bill. The court, after inquiring into the facts with regard to the former hearing, allowed a new hearing only with regard to material facts not already found by the committee; to which ruling the defendants excepted.

The new hearing was had before the court, and on it the following further facts were found: That Smith, while in California, about the 1st of January, 1850, under the belief that he could not longer pursue the business of gold digging in California with profit to himself or the plaintiffs, by agreement with them, changed his business into that of lightering, and continued in that business in California during the remainder of the two years covered by the contract, and so long as to acquire in the business of lightering the sum of \$9,000, as specified in the report of the committee; that the amount so made was to be divided between the parties to the original agreement, according to the terms of that agreement, and that it was so made by means of the money advanced to Smith by the plaintiffs, which had enabled him to go to California with provisions to sustain him there for two years, and which, with such money as he had procured by gold digging, enabled him to engage in the business of lightering; that there was,

on the first day of February, 1852, and at the time the petition was brought, in the hands of the respondents, moneys belonging to the plaintiffs, so made and procured by Smith, amounting to the sum of \$815.40; and that while the suit was pending, but before the amendments were made, Newman, the other defendant, paid over to Smith all the money which he had received from him of his acquisitions in California.

The respondents claimed that no consideration was shown for the contract introduced by the amendment, and the respondent Smith therefore insisted that the contract was void; the respondents also insisted that no decree could be made against either of them, because the contract introduced by the amended petition was a contract to which the respondent Newman was not a party, whereas he was a party to the contract on which the original petition was brought; and Newman claimed that no decree could be made against him, because he had paid over the money before the amendments were made.

The plaintiff claimed a decree in their favor, and also full costs for all the time the case had been pending in court, except for the time when costs were allowed against them on the allowance of the amendment to the original petition. The respondents claimed a decree in their favor, with the allowance to them of full costs, except the costs paid them on the amendment of the petition. They also claimed that if a decree should be made in favor of the plaintiffs no costs should be taxed, or, if any, that costs accruing previous to the amendment of the petition should not be taxed against them.

The questions as to what decree should be passed in the case, and as to the taxation of the costs of the case, were reserved for the advice of this court.

DUTTON and FERRIS, for the plaintiffs.

HAWLEY and LOOMIS, for the respondents.

SANFORD, J.

This case, which has already been three times before us, is now presented (we hope for the last time), for our advice in regard to a final decree.

The original contract between these parties was, that Smith, one of the respondents, in consideration of the sum of \$1,200 advanced to him by the petitioners and Newman, the other respondent, should go to California and dig gold there, for the joint benefit of all the contracting parties; for the period of two years, and should from time to time remit to the petitioners and Newman the proceeds of his labor, three quarters of which proceeds were to be held for the benefit of said Smith, and the residue to belong to the petitioners and said Newman. Under that contract Smith, in the month of April, 1849, commenced digging for gold in the California mines, and for several months prosecuted the business with diligence and assiduity; but not being very successful, and having met with some losses, he became satisfied that he could not pursue that business with profit, and about the first of January, 1850, by agreement with the petitioners, and with their consent and approbation, he changed his business from that of gold digging to that of lightering, and continued in said business of lightering in California during the remainder of said two years, and made thereby the sum of \$9,000; and the superior court finds that said sum of \$9,000 was made and procured by said Smith by means of the money advanced to him by the petitioners, and was to be divided between the parties according to the terms of said original agreement; and that while said Smith remained in California he secretly remitted to said Newman about \$6,000 of the avails of his said business, and after his return from California secretly placed in said Newman's hands the further sum of \$2,000, part of said sum of said \$9,000 obtained as aforesaid; the deposit of all which money in said Newman's hands, and his receipt of it, were by said Smith and Newman designedly concealed from the petitioners, with intent to prevent them from claiming or obtaining any share of said money so obtained by said Smith in said business; that said Smith, before the commencement of this suit, had paid to the petitioners the amount which they had advanced to him, and interest thereon, being \$1,209.60; and that at the time of the commencement of this suit, on the first day of February, 1852, "there remained in the hands of the respondents, of moneys belonging to the petitioners so as aforesaid made and procured by said Smith," \$815.40.

Upon these facts thus found by the superior court, the right of the petitioners to a decree in their favor for the amount so found to be in the respondents' hands, with interest thereon from said first day of February, 1852, seems to us undeniable.

It is, however, claimed that, as the whole sum of nine thousand dollars was acquired in a business not contemplated or provided for in the original contract, upon the making of which contract the entire consideration on the part of the petitioners was advanced to said Smith, the new contract found to have been made up on the change of said business was without consideration and therefore void. But by the terms of the original contract Smith was bound to continue digging for gold the whole period of two years, whether successful or not. The agreement of the petitioners then to relinquish their right to his services in gold digging, was a good consideration for his agreement to serve them in the business of lightering instead.

The liability of Newman arises from his fraudulent reception and concealment of the money to which the petitioners were entitled, and his possession of it at the time the suit was commenced; and whether he returned it all to Smith, his co-conspirator, after the commencement of the suit, or not, is of no importance. The rights and liabilities of the parties to a suit are fixed and to be determined by the state of facts as they exist when the suit was brought, and one defendant at that time in possession of the subject-matter of the litigation, can not exonerate himself from liability by transferring that possession to a co-defendant afterward.

That the amendment was properly allowed, was determined by this court at a former term, and the allegations introduced by that amendment are now to be taken as part of the original bill, and to have the same effect in the ultimate determination of the cause as if they had been originally inserted: *Windham v. Litchfield, etc.*, 22 Conn. 226.

Again, it is claimed that the superior court erred in refusing to the respondents a rehearing of the whole cause after the amendment had been made. But we think that a question to be addressed only to the judicial discretion of the superior court. We will, however, remark with regard to it that, so far as we can discover, that discretion was exercised by the superior

court wisely and properly; but whether it was or not, this court has no jurisdiction to revise the decision. It is obvious that whether any, and if any, to what extent a new hearing was rendered necessary by the amendment, could be ascertained only by an examination or the report of the committee, and an inquiry into the manner in which the former hearing had been conducted before that committee. Such inquiry could be made only by the superior court. This court has neither the jurisdiction to make the inquiry, nor the means of making it. See *Camp v. Waring*, 25 Conn. 528.

The claims of the parties for costs also must be decided by the superior court. Costs in equity are always discretionary, and are allowed or not, in whole or in part, as the substantial equities of the case require; the court being guided, not by any positive and unyielding rules of law, but by the ever-varying circumstances of each particular case. Those circumstances can be, before this court, but partially developed, while before the judge who tries the cause they are necessarily all disclosed, and by him can be duly weighed and justly appreciated. Upon this question, therefore, we forbear to give to the superior court any advice.

The decree of the superior court should be in favor of the petitioners to recover of the respondents, Smith and Newman, the sum of eight hundred and fifteen dollars and forty cents, and interest thereon from the first of February, 1852; the question as to the costs to be decided by the superior court.

In this opinion the other judges concurred.

Decree for plaintiffs advised.

EAGLE ET AL. V. BUCHER.

(6 Ohio State, 295. Supreme Court, 1856.)

Statement of terms of the prospecting arrangement—Holding, as to the relation of the parties—Unauthorized disbanding. Where several persons form an association, by the subscription of stock and the adoption of a constitution, to procure gold from the mines of California, and agree to send eight persons, to be selected from their number, to labor

in obtaining such gold, under an agreement to furnish them with outfits and money for their expenses, and on their return to have an account and division of the articles of value which they may acquire—*Held*, that the persons thus selected to labor for the association, though members, stood also in the relation of employes of the association, and their refusal, after arriving in California, to work together, and the partition among themselves of the property of the association with a view of aiding their separate and independent labors, do not work a dissolution of the association, nor discharge them from the obligations to it under their contract.

¹ *Idem*—Prospector can not sever his relation at will. Such act of separation and abandonment of duty exonerates them from liability to each other, but not to the association.

Idem—Prospector compelled to account—Election of remedies against him. It is competent for such association to compel an account and payment by either of the eight, of his earnings while thus working separately, in favor of the other members of the association, or to sue either of them for a breach of his contract, at its election.

Idem—Prospector not accounting, excluded from distribution. In taking a decree against one of such laborers for the proportion of his earnings which is due to the association by the terms of the contract, all of the eight should be excluded from the distribution except those who render an account, pursuant to the articles of association.

Bill in chancery. Reserved in Ashland county.

In January, 1849, the complainant and defendant formed themselves into a company, which they named "The Mohicansville Mining Association," for the purpose of acquiring gold and other articles of value in California. It was agreed that the capital to be employed should not be less than \$800, to be divided into thirty-two shares of \$25 each, and that the members should select from their own number such men as they wished to send to the gold regions to obtain gold, and that the persons so selected should be required to go to the mines and use all honorable means to acquire as much gold and other articles of value as possible, and return the same to the association in Mohicansville within two and a half years from the time they should start. The association was to furnish the equipments and expenses of those who should be sent to the mines. The gold and articles of value which should be acquired were to be divided as follows: *First*, the expenses of those who should go to California (over \$200 to be advanced by the association to each one of them) were to be

¹ *Von Schmidt v. Huntington*, 6 M. R. 284.

taken out. *Second*, one half of the balance to be retained by them. *Third*, the remaining half to be divided among the members of the association in proportion to the amount of stock owned by each. If no gold was obtained, the stockholders were to lose their stock, and those who went to California were to lose their time.

There were some thirty subscribers to what they called their constitution, and about \$1,700 paid in as stock. The members then elected eight of their number to go to California, of whom the defendant was one. The whole amount of the money which had been raised as stock was expended in furnishing these men their outfits and expenses for the journey, and with implements to use after arriving in the gold regions; and on the 5th of April, 1849, they left Mohicansville, in Ashland county, for California, by the overland route, and arrived at Sacramento about the 15th of September of that year. On the way they had difficulties and quarrels among themselves, and in four or five days after reaching California they sold out what property was on hand, divided the proceeds among themselves, and each one took his own way. Several of them said "they would not pay a d——d cent to the company," but Bucher said he would do what was right, provided the rest would. Before the expiration of the two and a half years, David Kauffman, one of the eight, died. The defendant and four others returned to Mohicansville. The other two remain in California. During the two and a half years no intercourse was had between the association and any of the eight in California.

Bucher returned home in 1851, bringing with him a large amount of gold, but he refused to pay anything into the treasury of the association, or to give any account of his earnings, or to acknowledge in any way the right of the other members of the association to share with him his earnings. Philip Wertsbaugher, one of the eight, returned with a small amount of gold, and settled with the association, or at least offered to comply with the constitutional requirements.

This bill is filed in the names of the other members of the association against Bucher, to compel an account and payment by him pursuant to the articles of the constitution.

Bucher, in his answer, offers to refund to the association

one eighth of the \$1,700 which he and his seven companions received, deducting therefrom his subscription of stock; but he protests that the other members have no legal or equitable claim upon him for any further share of the avails of his labor or enterprise accruing after he was abandoned by his associates, and after the design of the association had been defeated by what he claims was its dissolution. He renders an account of what he accumulated in California, showing himself in possession of \$12,130, exclusive of all expenses.

The cause in the court below was referred to a master to state an account between the parties, who made a report in the premises, to which exceptions were filed by defendant.

JOHN P. JEFFRIES and P. B. WILCOX, for complainants.

LEVI COX, for defendant.

BOWEN, J.

The parties interested in this cause properly denominated themselves an "association." Their organization was completed by the adoption of a constitution, to which they all subscribed. The object of thus uniting together is fully defined. It was limited to one purpose—a mining adventure—to be conducted upon terms set forth and agreed upon. In the fruits of that adventure all were to participate according to what were deemed equitable rules. To carry on the enterprise, capital was necessary to be raised and expended, and labor must be performed in a region two thousand miles or more distant from the locality of the associated body. These two points were therefore primarily considered and decided upon. From the members of the association eight were to be chosen to perform the journey to the mines, and, after reaching there, to employ their skill and industry in procuring the golden treasure for themselves and companions in the enterprise. Within a given period they were to return and place into the treasury of the precept institution the productions of their labor for distribution among its several members. When they separated from the association to go to their remote place of employment, they took with them in

teams, implements for mining, provisions and money, all of its resources. These they were to retain, as well as one half of their net gains, but were to divide the other half with their fellow associates. They must be regarded as employes—as hired men—laboring by contract for the association, whose delegates and servants they were. They might properly co-operate together, might choose a captain and other officers from their own members to direct their affairs on the way, and during their continuance abroad. This they attempted to do; and while we are free to concede that they had full power, as detached and separate members of the association, required by the nature of their undertaking, to act without its presence and advice, to regulate by rules of their own the duties to be observed by themselves, yet they could not, by such private regulations, dissolve the association, nor release themselves from their contract to labor and account for their earnings, or to answer in damages for a breach of it. The determination which they formed and acted upon after reaching California, of appropriating the property of the association among themselves individually, and of working separately, in disregard of their obligations to the association, was a most inexcusable and immoral violation of their written and valid obligations to their principals. That act can only be characterized as one of marked dishonesty and bad faith. As between the eight, it was a relinquishment of each to the others of all claims to their joint earnings. Each accepted the proposal to work alone, and share separately the benefits of his individual labor, without any recourse upon the others; but as to the association into whose service they had entered, and whose interest they had undertaken to promote, they could not by this *ex parte* and wrongful movement relieve themselves from liability. Whether they wrought jointly or separately, whether their earnings were large or small, they were nevertheless responsible to the association, and could be required to account to it for whatever they made during the time they were thus employed.

The principle relied upon by defendant's counsel, that a partnership may be dissolved by the act of one of the partners, we do not, in the view we take of this case, intend to impugn. That is too well settled to be now questioned. But to effect

that purpose the act must be done with a view to its accomplishment. It should be communicated at once to the other members of the firm. They must be advised of the new relations created by the withdrawal of a member, or a transfer of his interest in the concern. Their future relations toward each other, and their pursuit of the particular enterprise, depend on the acquisition of such knowledge.

Now, whether the eight men intended anything more than the dissolution of their own organization, and liberty to each to work when and where it best suited him, does not seem to be very clear. Some of them said they would never pay anything to the association. But they did not certainly, by any expression or act, signify that they intended to dissolve the original association. Their acts do not indicate that to have been their object. They were willing, doubtless, to free themselves from working together, and from reporting any account of their gains. But as we have before shown, while they might accomplish these ends as between themselves, they could not, standing as they did in the places of hired men, far removed from the observation of, and without the means of communicating with their co-members at home—bound by their agreements to serve as such, and to give statements of their labor within the time agreed on, disconnect and discharge themselves from the association.

If the defendant was fortunate in his visit to and labors in the mines—if his hopes were more than realized by his good luck in procuring gold in large amounts—he ought to have borne in mind that the aid of the Mohicansville association rendered to him had mainly contributed to his good fortune—that in reality he owed it to the organization of that body and the employment of the means it gave him to engage in the enterprise; and that, however others had fared who had gone on the same errand with himself, or however faithless they may have been to their employers, it was his duty, in the true spirit of the agreement, to share with his patrons the fruits of his toil and good management. This he declined to do, and it is in this proceeding sought to coerce him to perform that which he has, against equity and conscience, refrained from doing; and we think the appropriate relief should be granted.

The exceptions to the master's report must be sustained.

and an account taken as to the amount of money earned by the defendant. One half of the sum found to be in his hands he will be allowed to retain. The other half must be distributed to the holders of the stock of the association, *pro rata*, but excluding all of the eight who went to California, except the defendant and Philip Wertsbaugher. The stock subscribed by them to share in the distribution with the others.

Decree accordingly.

BARTLEY, C. J., and SWAN and SCOTT, JJ., concurred.

BRINKERHOFF, J., having been of counsel, did not sit.

HARVEY V. COFFIN.

(44 New Hampshire, 563. Supreme Judicial Court, 1863.)

Abandonment of adventure by associates—Obligations to outfitter.

Defendant, by indenture, in consideration of an outfit furnished by plaintiff, covenanted to join a party about to go to California, and to give plaintiff one half of his net earnings for two years, and to remain with the company for that time. The defendant did go with the company, which, shortly after arrival, dissolved by a majority vote of its members without fault of the defendant and against his consent. After the dissolution defendant worked on his own account, but as the plea stated, earned nothing beyond his living. *He'd*, that there was no undertaking on the part of defendant that the company should continue two years, and that upon its disbanding without his fault he was released from further obligation.

Covenant. The declaration avers that in an indenture under seal, dated the 10th day of March, 1849, the plaintiff covenanted that he would immediately furnish for the defendant a fit-out to the amount of \$300, to go to California as a member of the N. H. Mutual Mining and Trading Company; in consideration whereof the defendant covenanted that the plaintiff should receive half of all the earnings, gettings, etc., which might be made by the defendant for the space of two years—living excepted—from the time of the sailing of the defendant from Portsmouth with the company; and that the defendant further covenanted that he would attach himself to and remain with the company, and devote his time and services to obtaining

money or property, for two years, subject to the rules, regulations and constitution of the company; and that he would leave in the hands of the company half his share or earnings aforesaid, for the use of the plaintiff; that the plaintiff did on the 12th of March, 1849, pay the \$300 to the order of the defendant, but that the defendant, though he did attach himself to the said company and become a member thereof, did not remain with the company nor earnestly and faithfully devote his time and services to obtaining money or property for said space of two years, subject to the rules, etc., of the said company, etc., etc.

The third plea of the defendant alleges that said defendant did attach himself to said company at Portsmouth, on the 10th day of March, 1849, and did remain with said company until the 1st day of July, then next ensuing; that on said 1st day of July, 1849, the company dissolved at San Francisco, by a formal vote of the majority of the members thereof, but without any fault on the part of said defendant, and against his consent; that during the existence of the company said defendant did devote his time and services earnestly and faithfully to the obtaining of money and property for the use and benefit of said plaintiff and said defendant, subject to the rules, regulations and constitution of said company, and did earn, place and leave in the hands of said company, subject to the order of said plaintiff, more than one half of all his earnings, etc., living excepted, during said time, namely, \$135 and upward; that after the dissolution of said company, and during the remainder of said two years, the defendant did continue to devote his time and services earnestly and faithfully to the obtaining of money and property for the use and benefit of said plaintiff, but did not earn, get, acquire or accumulate anything over and beyond his "living," etc.

To this plea the plaintiff filed a general demurrer, and there was a joinder.

ALBERT R. HATCH, for the plaintiff.

A. H. HOYT, for the defendant

BELLOWS, J.

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Upon the pleadings before us the case is, that a company having been formed in New Hampshire to go to California for the purposes of mining and trading, the plaintiff furnished the defendant with the sum of \$300 as a fit-out to go, as a member of such company; in consideration whereof the defendant covenanted that the plaintiff should receive one half of all the net earnings of the defendant for two years from the time of his sailing from Portsmouth with the company; and that he would attach himself to and remain with said company and devote his time and services to obtaining money and property for two years subject to the rules, regulations and constitution of the company, and would leave in its hands half his share of earnings for the use of the plaintiff.

The defendant did go to California with the company March 10, 1849, and remained with it until July 1, 1849, when the company was dissolved by a formal vote of a majority of its members, without any fault on the part of the defendant and against his consent; and during its existence the defendant did devote his time and services earnestly and faithfully to the obtaining of money and property for the use and benefit of the plaintiff and defendant, subject to the rules, regulations and constitution of the company; and did earn and have in its hands, subject to the plaintiff's order, one half of such share or earnings, namely, \$135; and during the remainder of said two years the defendant did continue to devote his time and services to the obtaining of money, etc., but did not earn anything beyond his living.

Upon this state of facts the question is whether, upon a fair construction of the agreement, the defendant undertook for the continuance of the company for the two years. If he did, then the plea is no answer to the action; for it is well settled that if the performance of a promise becomes impossible by the act of a third person, the promisor is not excused: Chit. on Con. 340, and cases cited; *McNeill v. Reid*, 9 Bing. 68; 2 Black. Com. 340.

In the case before us there is no formal, express promise that the company shall continue to exist for two years; and the inquiry is whether such undertaking is to be inferred from the promise to remain and serve with the company for that space of time.

In *Goodell v. Smith*, 9 Cush. 592, and *Field v. Woodmancy*, 10 Cush. 427, where there were similar promises, it was held that no undertaking for the continuance of the companies could be inferred; but in those cases the party advancing the outfit was himself a member of the company, and therefore as authorities they are not decisive of the present case.

We are, however, of the opinion that no such undertaking by the defendant can be gathered from the terms of this contract. Had the defendant simply agreed to attach himself to the company, and devote his time and services to obtaining money for two years, then the law would seem to be that he could not excuse the want of performance by showing that the company refused to have him join it, or had dissolved after he had done so; and this would be because it was his own fault that he had not previously ascertained that his agreement would be fulfilled. But in this case, taking into consideration all the stipulations between the parties, the arrangement in effect appears to have been that the defendant should devote his time and services to the company, as a member of it, for two years, subject to its rules, regulations and constitution, that the plaintiff should advance an outfit of \$300, and that the profits should be equally divided between them. And it is obvious, we think, that this agreement was made with a knowledge of the character and rules of the company, and that both parties contemplated that the conduct and management of the enterprise was to be confided wholly to the company, which was empowered to determine in what manner the services of the members should be employed, when and where to commence, and when to cease; and nothing is disclosed that imposes any limitations upon the ordinary right to dissolve the company at pleasure.

So far as regarded the conduct of the business, the parties were clearly subject to such rules and regulations as the company might make, for such is the effect of their express stipulations; and there can be no ground for a claim that the defendant undertook that the business should be well conducted by the company; neither do we see any ground for inferring a promise by the defendant that the company should continue the business during the whole of the two years, and should neither suspend nor wholly terminate it during that

time. On the contrary, we think it fairly within the contemplation of the parties that the discretion with which the company was invested should extend to the subject of terminating the enterprise whenever it should be deemed best for the interest of its members, as it might be in order to save from further hazard the profits already realized.

In this case then the company does not stand in the condition of a stranger to either party; but all the stipulations are based upon the assumption that the enterprise, in which the parties are jointly interested, is to be wholly under its direction.

If, in point of fact, the rules of the company had prohibited its termination before the expiration of the two years, still an actual dissolution before that time would have put it out of the power of the defendant to perform the stipulated service; and as he had not undertaken for the continuance of the company, he would not be liable unless such dissolution was with his fault.

Demurrer overruled.

PIERCE V. BUCKLIN.

(7 Allen, 261. Supreme Court of Massachusetts, 1863.)

¹ **Contract for share of net earnings construed—Prospector not liable for unavoidable losses.** P. agreed to furnish B. with passage money and funds to go to California, not to exceed \$175, and in consideration therefor B. agreed to occupy a specified period from the date of his arrival in San Francisco in digging gold, or in such other business as he should deem most profitable, and to pay one third of his net earnings during said period to P. About the expiration of the period B. sold the whole property which he had acquired, viz., a mill, for \$1,000, taking the note of the purchaser, who was then reputed to be good, in payment. Afterward the purchaser became embarrassed, and B. accepted two bonds of the S. F. C. Co., then reputed to be worth par, in settlement for the note, but the bonds became worthless: *Held*, that if in these transactions B. was in good faith endeavoring to convert his profits into cash, and in so doing and without fault met with the losses which prevented him from realizing any net profits, he was not liable for any earnings on the contract.

¹ *Thompson v. Prouty*, 12 M. R. 290.

Contract upon an agreement entered into between the plaintiff and the defendant, the material portions of which are as follows: "First, the said Bucklin, for the consideration hereinafter mentioned, does hereby for himself, his heirs, executors and administrators, covenant and agree with the said Pierce, his heirs, executors, administrators and assigns, that he will proceed and go forthwith to California in the schooner Abby P. Chase or some other expeditious way; that he, the said Bucklin, will, until the expiration of two years from the date of his arrival in San Francisco, California, employ and occupy his time in digging gold, or in such other business as he shall deem most profitable; that of his net earnings of whatsoever business he may be engaged in for the said term of two years, one third he will give and pay to the said Pierce. And if the said Bucklin should conclude to remain three years from the date of his arrival in California, the above named part of his net earnings shall be paid to the said Pierce. The intent and meaning of this instrument is, that the said Pierce shall have the above named proportion of said Bucklin's earnings for the term of two years after his arrival in California, and for the term of three years if said Bucklin should conclude to remain that length of time in California.

"And the said Pierce does hereby, for himself, his heirs, executors and administrators, covenant and agree with the said Bucklin, his executors, administrators and assigns, that he will pay the passage money and furnish funds, not to exceed one hundred and seventy-five dollars, for fitting said Bucklin out for California."

The plaintiff sought to recover one third of the net profits of the defendant for three years, ending in May, 1853.

At the trial in the superior court, before BRIGHAM, J., the defendant admitted that during the three years he had at one time realized profits to the amount of one thousand dollars, and introduced evidence to show that he lost the whole of the same in the following manner: He arrived in California in May, 1850, and, having first met with misfortune, purchased an interest in a mill, in the early part of 1852, for which he paid in full by the early part of 1853. In February, 1853, he sold his interest to Daniel W. Chichester, who was then reputed to be good, for one thousand dollars, and took his note for

the amount "on less than one year." In the spring of 1854 Chichester had become somewhat embarrassed, and the defendant took in payment of the note two bonds, of five hundred dollars each, of the South Fork Canal Company, payable in four months thereafter. The defendant testified that they were then worth that amount; but they afterward became worthless, and the defendant realized nothing upon them.

Upon this evidence the judge directed a verdict for the plaintiff for \$333.33, with interest from the time when a demand was proved, which was rendered accordingly; and the defendant alleged exceptions.

C. I. REED, for the defendant.

J. C. STONE, for the plaintiff.

BIGELOW, C. J.

Upon a fair interpretation of the contract between the parties, we think the court erred in ruling as a matter of law that there was anything due to the plaintiff when this action was brought. A very wide discretion was vested in the defendant during the continuance of the agency or copartnership contemplated by the parties. He was not obliged to confine himself to any particular trade or business, nor to conduct it in any special or prescribed manner; nor did the defendant guaranty that there should be any profits as the result of his transactions in California. He had a right to continue the business of the agency during the full term of three years. As incident to this right to carry on business during the term according to his discretion, the defendant had power to contract debts, and to give credit to persons for the price of property sold by him for the purpose of closing the joint dealings of the parties under the contract. Indeed, it could hardly be expected that transactions embracing a period of three years could be finished and finally closed, and the profits be rendered certain and reduced to cash immediately after the expiration of the agency. The defendant, therefore, did not exceed his authority in selling the property which he had acquired in California on credit, or in taking a note as the

consideration of the sale; nor was it beyond the purview of the contract, if circumstances rendered it necessary or expedient, to take in payment of such note, shares in an incorporated or joint stock company, which were of value sufficient, if converted into money, to pay the amount due on the note. We do not mean to say that the defendant had a right, after the expiration of the three years, to trade with the profits which he had acquired, or to enter into new enterprises and speculations by which the money or property in his possession under the contract would be put at hazard; but he was clearly entitled to a reasonable time to finish the business of the agency, and by the use of proper means to convert the profits which he had earned into cash. If, before the expiration of such reasonable time, and while acting in good faith in his efforts to obtain the money for that which he had received in exchange for the property acquired by him under the contract, he met with losses by reason of which, without fault or neglect on his part, the net profits were all lost, and nothing was realized by him as the fruits of the enterprise, he can not be held liable in this action. The case should have been submitted to the jury with instructions, which in substance would have embodied this view of the relative rights and duties of the parties.

Verdict set aside.

ESCOUBAS ET AL. V. LOUISIANA PETROLEUM AND COAL
OIL Co.

(22 Louisiana Annual, 280. Supreme Court, 1870.)

Rule of construction. In interpreting agreements it is an elementary rule to construe the clauses together, giving to each the sense which results from the whole instrument.

In mora. Parties are put *in mora* by a demand that they do that which in a legal sense they ought to do, and can do.

The distinction between a modus and a suspensive potestative condition is that the former is obligatory, and if the party bound is passively violating his obligation, he must be put in default before an action will lie. In the latter, its accomplishment depends upon personal choice;

the party on whom it is imposed is free to accomplish it or not, and to put him in default would be a vain thing, since it would be to demand that he do what he is under no obligation to do.

Oil prospecting contract—Suspensive and potestative condition. An agreement was made between plaintiffs, the owners of mineral lands, and the assignor of defendants, of a two-fold character, including a license to mine, and a lease for ten years in case of successful discovery. The defendants lost all rights thereunder by lapse of time, no workable quantity of petroleum having been discovered within the period limited by the contract. Plaintiffs then agreed to refrain from declaring a forfeiture provided defendants would carry on the search for petroleum constantly, and without cessation. *Held*, that the latter agreement was conditional; that its condition was suspensive and potestative, and that when the defendants ceased to carry on their search for petroleum the plaintiffs were entitled to declare the forfeiture of the contract by suit, and claim possession of the lands without a formal putting in default.

Sulphur—Similar produce. Whether sulphur was a "similar product" under a contract based particularly upon the expectation of finding petroleum—not decided.

Appeal from Fourth District Court, Parish of Orleans.

THEARD, J., W. B. KOONTZ & ELLIOTT, CHRISTIAN ROSELINS and ALBERT VOORHIES, for plaintiff and appellant.

A. N. & H. N. OGDEN and J. D. HILL, for defendant and appellee.

HOWE, J.

On the 5th of October, 1865, Hilaire Escoubas and Truxton Lowell entered into an agreement in writing with J. W. Mallet by which it was stipulated that the latter should have "the entire, absolute and undivided control of all petroleum, mineral, oil or other similar products existing beneath the surface of the land," owned by the former, in Calcasieu Parish, and described in the first article of the agreement, and "the right to bore, dig and mine for said petroleum or similar product, to extract the same, to prepare it for market by refining or otherwise, to transport, sell and dispose of said petroleum in any way he might see fit, and in general, to have and enjoy all the mineral rights of the parties of the first part (Escoubas and Lowell) in and with reference to said land.

The above rights and privileges to continue for the term of ten years from the date of the signature of this contract."

By the second, third, fourth and fifth articles of the agreement, the party of the second part (Mallet) had the right to occupy such land as might be necessary for such buildings as would be required for operatives, etc., and for the prosecution of the "proposed workings," the right to cut certain timber and wood, the right of pasturage for animals to be employed in the work, and the right of way for necessary roads—these privileges to continue for ten years.

By the sixth and seventh articles, Mallet agreed to pay the sum of \$20,000 in cash by November 1, 1865, and in the event of oil or petroleum being found in "workable quantity," to pay to the parties of the first part one half the gross product of such oil or petroleum.

The tenth article is as follows:

"In the event that the said party of the second part, his agent or assign, shall not, before the 31st of December, 1866, make experimental borings on said land, and obtain oil or petroleum in workable quantity, all rights of the said party of the second part, his agents or assigns, growing out of this contract, shall cease (without any claim on the part of the said party of the second part, his agents or assigns, to restoration of any portion of the above stipulated payment of \$20,000); but in the event that oil or petroleum shall be found upon said land prior to said 31st of December, 1866, all said rights shall continue for the full term of ten years."

On the 1st of June, 1866, Mallet transferred his rights under this agreement to the defendants in this action. No petroleum was discovered in "workable quantity" within the time limited by the tenth article, namely, the 31st of December, 1866. On the 4th of January, 1867, Escoubas and Lowell made an agreement with the defendants recognizing this transfer and the pendency of certain claims to the land by a third party, and covenanting in consideration of the premises, "to extend the forfeiture of said contract and lease of the 5th of October, 1865, aforesaid, as set forth in the tenth section of said contract, from the 31st of December, 1866, up to and until the 31st day of December, 1868;" and further agreed "not to declare a forfeiture of the lease now transferred to and being

the property of said company," (the defendants,) "during the unoccupied term of said lease; provided, however, that said company shall use every exertion to develop the resources of said lands, and shall continue constantly and without cessation to carry on the work necessary to procure oil or petroleum upon said lands, and shall operate upon said lands to the fullest possible extent for the production of petroleum or coal oil, it being understood however that said work shall not be considered as having ceased, should the company be prevented temporarily from continuing the same by inevitable accident, overpowering force, or the act of God."

The defendants proceeded with the work and bored one well to the depth of 1,230 feet, but failed to discover petroleum in "workable quantity." At the depth, however, of about 400 feet, they penetrated a bed of crystalized sulphur of remarkable thickness, and this discovery appears to be the cause of the controversy now before us.

This action is instituted to recover possession of the lands in question, on the allegation that the defendants were without means, money or credit to carry on the works and that the work had been discontinued; that it was not being carried on to the fullest extent possible for the production of oil or petroleum, and not in such a manner as said company was bound to do to avoid the forfeiture of the lease.

The defendants answered by denying generally the allegations of the petition, except as admitted in the answer. They admitted the execution of the several agreements above mentioned, averred that the tenth section of the act of fifth of October, 1865, was annulled and abrogated by the agreement of January, 4, 1867, (from which we have quoted the clause to which the defendants here refer,) and declared that they had fully complied with the conditions of this clause by continuing constantly and in the most judicious manner to carry on the necessary work to procure oil and petroleum. They also made a reconventional demand for damages.

The plaintiff filed a supplemental petition, alleging that after the commencement of this suit, eleventh of August, 1869, and up to the time of the filing of the supplemental petition, the defendants had ceased all work and had abandoned the work and left the premises; and this was met by a general denial and a further reconventional demand for damages.

It appears by the record that the parties agreed that the question of the right to the sulphur should be determined in this controversy, the defendants claiming the whole of it, and the plaintiffs making a similar exclusive claim on their part. The judge *a quo* arrived at the conclusion that the non-compliance with the condition imposed on the defendants is to be considered as a passive violation of the contract, and that a putting *in mora* was an indispensable pre-requisite to maintain the action. Beyond this, he was of opinion that the defendants had not violated their agreements, and that they were entitled on principles of equity to one half the net profits of the prospective sulphur mining. The prayer of plaintiffs for possession was therefore rejected, as well as the reconventional demand of the defendants, and a judgment rendered decreeing the defendants to be entitled to the exclusive control of the digging and boring of all mines on the property leased, including the sulphur lately discovered, and the plaintiffs entitled to one half the net profits arising from the digging of said mines, etc. Both parties complain of the judgment. The plaintiffs have appealed, and the defendants, answering, pray that it be amended in their favor so as to give them all the sulphur during the remainder of the ten years, half of it thereafter, in perpetuity, and their damages in reconvention.

The pleadings, the testimony and the printed and oral discussions in this case, have taken a wide range, but we do not find ourselves called upon to pass on all the questions raised. Taking up those which we deem essential to a proper decision of the controversy, we are in the first place satisfied, from an examination of the testimony, that no petroleum was found up to December 31, 1865, nor was any found in workable quantity up to December 31, 1868. Of this there is no dispute. We further find that the defendants had not, up to the institution of this suit, in August, 1869, used every exertion to develop the resources of the lands in question, and had not "constantly and without cessation carried on the work necessary to procure oil or petroleum," and had not "operated upon said lands to the fullest possible extent for the production of petroleum or coal oil." On the contrary, we find in June, 1869, the work abandoned, the defendants deeply in debt, their treasury empty and their engineer deserting them because his wages remained

unpaid. We find the desperate expedient suggested of paying the workmen in stock of the company. We find that thereafter, and up to November, 1869, the same condition of affairs as alleged in the supplemental petition. Indeed, we gather from the whole record that the search for petroleum in this instance, as in thousands of others, was a failure, and was abandoned by the defendants, who devoted their energies thenceforward to an endeavor to procure some means, not for the further search for petroleum, but for the mining of the sulphur, to which they claimed a right.

Upon this state of facts, what is the legal result? In interpreting the agreements of October 5, 1865, and January 4, 1867, we must follow the familiar rule of construing the clauses together, giving to each the sense which results from the whole instrument: Domat, p. 1, b. 1, t. 1, Sec. 2; C. C. 1950. We find the first agreement two-fold—a right to mine for petroleum and similar products (and whether this included the right to mine for sulphur we are not called upon to determine), and in the event of successful mining, a right for ten years from the date of the agreement to one half the gross product. The tenth article of the agreement, which we have quoted, repels the idea of an absolute, unconditional lease of the property for ten years. On the contrary, if the search for petroleum was unsuccessful up to December 31, 1866, all the rights of the party of the second part were to cease; and they did cease, for the search up to that time was unsuccessful. If, on the first of January, 1867, the plaintiffs had demanded possession of their lands, it can hardly be imagined that the defendants would have resisted the demand, or would have claimed that they must first be put *in mora*. Defendants are put in default by demanding that they do something that in a legal sense they ought to do and can do.

Now, on the fourth of January, 1867, another agreement is made, the important clauses of which we have quoted. By this the plaintiff entered into two obligations; the one absolute, the other conditional. They said, in effect, to the defendants: "The agreement with Mallet, of which you are transferees, is forfeited, but we now promise to waive that forfeiture. Up to the thirty-first of December, 1868, the waiver is absolute, but beyond that time we will create a conditional obligation;

its condition shall be suspensive, and, so far as you are concerned, potestative. We agree *not to do* a certain thing, provided you do something which lies entirely in your volition. If you will continue, unremittingly, to mine for petroleum, we will refrain from declaring a forfeiture which already exists." This construction disposes at once in the negative of the question whether a formal putting in default was necessary. We must distinguish in this regard between a *modus* and a condition proper. The former is obligatory, and if the party bound is passively violating his obligation he must be put in default. But the condition in this case, at once suspensive and potestative, is one whose accomplishment depends on personal choice, and the party on whom it is imposed is free to accomplish it or not. "Je vous donne le fonds cornélien, si vous faites telle chose ; voilà une condition. Je vous donne le fonds cornélien, à la charge par vous de faire telle chose ; voilà un mode, parce que la charge qui vous est imposée ne suspend ni ne retarde l'exécution de notre convention, et que son inexécution, de votre part, doit seule entraîner sa résolution. C'est bien là le caractère essentiel qui distingue le mode de la condition suspensive, dont il se sépare par les caractères de la condition résolutoire, et encore par ceux qui lui sont propres. *Dans les conditions dont l'accomplissement dépend d'un fait personnel, celui à qui il est imposé est libre de l'accomplir ou non.*" * * * "*Le mode au contraire, est une chose, ou un fait, stipulé pour soi-même, ou pour autrui, obligatoire et payable.*" Larombière, Obligations, Vol. 2, pp. 6 and 7.

It would in this case, therefore, have been a vain thing for the plaintiffs to have demanded from the defendants the doing of something they were under no obligation to do, and the putting *in mora* was unnecessary, or rather, legally impossible.

We are constrained, therefore, to conclude that the plaintiffs are entitled to the possession of the lands. It is therefore ordered that the judgment appealed from be avoided and reversed, and that the plaintiffs have judgment as prayed for, for possession of the lands described in their petition; that a writ of possession issue in due time therefor, and that the defendants pay the costs of both courts.

BOUCHER ET AL. V. MULVERHILL.

(1 Montana, 306. Supreme Court, 1871.)

Prospecting partnership construed. Plaintiffs furnished to certain miners money and provisions, in consideration that the miners would locate claims for the plaintiffs when they made a discovery. *Held*, that this contract constituted a mining partnership within the meaning of the following district rule: "That no claim shall be recognized as legally held unless the prior claimant has personally pre-empted the same, with the exception of three claims allowed the discoverers for their prospecting partners." *Held further*, that plaintiffs could maintain an action for the possession of a claim located for them in pursuance of such contract.

¹**Prospecting contract no commercial partnership.** A mining prospecting partnership is not governed by the technical rules of the law of commercial partnership.

²**Location by absent outfitters.** The mining law of a district, which allows those who furnish money and provisions to the discoverers of placer gold mines to hold claims without personally pre-empting them, is not against public policy, and should be upheld.

Instructions that mislead not given. The court will not give an instruction that is correct if it will mislead the jury.

Appeal from Second District, Missoula County.

The facts are stated in the opinion. The eighteenth section of the Mining Laws of the Barrette District, referred to in the opinion and briefs, is as follows: "That no claim shall be recognized as legally held unless the prior claimant has personally pre-empted the same, with the exception of three claims allowed the discoverers for their prospecting partners."

The case was tried in June, 1870, before KNOWLES, J.

CLAGETT & DIXON, for appellant, who was defendant below.

MAYHEW & McMURTRY, for respondents.

SYMES, J.

This was an action for the possession of a mining claim. Plaintiffs alleged that they were the owners and entitled

¹ *Settembre v. Putnam*, 11 M. R. 425.

² *Murley v. Ennis*, 12 M. R. 360.

to the possession of claim No. 5, in Barrette District, Missoula County, Montana; that in December, 1869, defendant entered upon said claim and wrongfully withheld it from plaintiffs; that the claim contained gold; and ask for possession of said claim, damages, and a restraining order until the termination of the suit.

Defendant answered, and denied that plaintiffs were the owners or entitled to possession of said mining claim; admitted that he and one Halloran withheld said claim from plaintiffs; alleged ownership and possession of said claim since the 10th of December, 1869, and that it was unappropriated before that time; denied that he was working the claim, insolvency, and asks judgment for costs.

The case was tried at the June term of the Missoula County District Court, and verdict found and judgment rendered for plaintiffs. Motion for new trial overruled, and appeal taken from order overruling motion, and the judgment.

Appellant asks for reversal of the case for the reasons that the verdict was against the law and the evidence, and for errors of the court below in giving and refusing instructions.

It appears by the evidence preserved in the statement, that one Barrette and Lowthier were the discoverers of Barrette District in Cedar Creek, Missoula county, Montana; that for some time before the discovery the plaintiffs had furnished said Barrette and Lowthier with money and provisions to prospect with, and had been working to get money to keep them prospecting; that previously to the discovery plaintiffs had an agreement and understanding with said Barrette and Lowthier by which they were to locate claims for them when they made a discovery; that \$200 or \$300 was so furnished and was being used by said discoverers when they discovered Cedar Creek gold mine. Section 18 of the Mining Laws of Barrette District provides that no claim can be legally held unless the prior claimant has personally pre-empted the same, except three claims to be allowed the discoverers for their prospecting partners.

Barrette and Lowthier, as the discoverers, located said claim 5 for the plaintiffs with two others, and they claim the possessory right and title to the same under said section 18 of the Mining Laws of said district.

Defendant came into Cedar Creek shortly after the discovery, and finding said claim unoccupied located the same and attempted to have it recorded, but the recorder refused to record it, and referred defendant to said section 18 of the laws to show him that plaintiffs had a right to hold it under the record as it then was.

It is contended by appellant that plaintiffs can not hold said claim under said Mining Law, because the evidence does not prove or show that plaintiffs were prospecting partners of the discoverers; that the agreement and understanding between them did not, in law, form a prospecting partnership.

We do not think this agreement or understanding between the plaintiffs and the discoverers of Cedar Creek gold mine should be subjected to or tested by the technical rules of the law of partnership. It is the spirit and policy of our mining common law, sometimes called, to enforce the rules and regulations of miners, and interpret their agreements made under such rules according to the real intention of the miners, when they do not conflict with positive law or public policy. What kind of an agreement or understanding did the miners of Cedar Creek intend, and to whom did they refer 'in said section 18 of their Mining Laws? Manifestly, from the evidence, to the plaintiffs in this case. There is no dispute but that said Barrette and Lowthier were the discoverers; that plaintiffs furnished them money and provisions for some time before the discovery, to continue to prospect for gold, and that they were living on these provisions when they made the discovery. Shall the court, because said section 18 of the laws states that the discoverers may locate three claims for their prospecting partners, and because the evidence does not show such facts as would, under the rules of commercial law, constitute a partnership, say that the plaintiffs can not hold their claims under said mining rule or law, so evidently passed for their express benefit? We think not. Laying aside the general law of partnership, and inquiring what miners ordinarily mean by the term, "prospecting partnership," we are of opinion that the agreement or understanding between the said discoverers of Cedar Creek gold mine and the plaintiffs below, was understood by the miners of Cedar Creek when they adopted said section 18 of their laws, to constitute a

prospecting partnership, and for that reason they designated the plaintiffs as the discoverers' prospecting partners for whom they might locate and hold three claims.

We do not think said mining rule or law is against public policy, as contended by appellant. On the contrary, the agreement by which plaintiffs furnished to said discoverers money and provisions, without which they could not have continued to prospect for the hidden precious metals, but which enabled them to discover a rich and extensive placer gold mine, thereby adding greatly to the development and wealth of our Territory, should be encouraged, as the miners in this case seem to have appreciated when they provided that the discoverers might locate, and the parties to the agreement might hold, three claims, without personally preempting them.

The error assigned by the court's refusing to give the instruction that if the jury did not find from the evidence that plaintiffs and said discoverers were prospecting partners they would find for the defendant, is not sufficient to reverse the judgment. While the court might correctly have given this instruction, it might have, if given, misled the jury, by causing them to test the said agreement in this case by the law of commercial partnership.

Judgment and order of the court below affirmed.

Judgment affirmed.

DUFF V. MAGUIRE ET AL.

(107 Massachusetts, 87. Supreme Court, 1871.)

- **Contract for report upon mines construed—Expenses of agent employed to advise on investments.** Duff, the plaintiff, and five defendants, signed an agreement under which, in connection with a letter of advice, plaintiff went from Boston to California to search for and report upon mining property. Upon his recommendation mines were to be purchased by the six parties and he was to be the superintendent; \$500 were advanced him for expenses. While absent looking for
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properties and after having advised on several he was notified by telegraph that the whole scheme was abandoned. *Held*, that the plaintiff was entitled to recover five sixths of his reasonable expenses, and also five sixths of the reasonable value of his services, although the sum should exceed the amount raised by the payment of \$100 each by the subscribers. *Held also*, that the objection that a partner can not recover compensation for his services in the joint business was not applicable to this case.

Where associates employ one of their own number to do a stranger's work they are equitably bound to pay him a stranger's wages.

Bill in equity against James Maguire, Jeremiah Pritchard, Joseph Hobart, William H. Dunbar and John Wooldredge. praying for a decree to compel the defendants to contribute toward reimbursing to the plaintiff his expenses, and making a fair compensation to him for his services, incurred or rendered in a business undertaking. The case was reserved by Ames, J., on the bill, the answers, the report of 'a master to whom it was referred to find the facts, and the defendants' exceptions to his report, for the determination of the full court; and the material facts were as follows:

The plaintiff and the defendants signed this agreement on the date thereof: "Boston, June 15, 1866. We, the undersigned, desirous of obtaining and working a gold property, do appoint Mr. W. R. Duff our agent, to proceed to California and make such investigations of mines as he may see fit, and report. And upon his recommendation, if satisfactory to a majority of the subscribers, we and each of us agree to raise the necessary amount of money, proportionately, to put the property in working order. And we further agree to pay the sum of one hundred dollars each to defray said Duff's expenses to California; and further, upon Mr. Duff's report, should it be decided to erect machinery upon the property he may recommend, he agrees to leave the question of his salary open, to be decided when he shall have placed the mill and property in working order. And it is further understood, that each subscriber hereto is not bound for a sum to exceed five thousand dollars currency."

On the same day the plaintiff received a letter addressed to him and signed by Maguire "for subscribers to agreement," of which the material parts were as follows: "As you are about to take your departure for California with a view to prospect

ing and examining mining properties, and reporting to us the result of your investigations relating to the purchase and working thereof, and as you are to be equally interested with ourselves in whatever property we may see fit to accept, it is due to you that you should be made acquainted as much as possible with our feelings and wishes in relation to the objects we have in view in employing you as our agent. It is the desire of all the gentlemen associated with you that you should be successful in finding a valuable property that will cost but little money, and it is expected of you that, before you report, you will visit the mines in the various localities, and that you will avail yourself of the aid and opinions of one or more of the most competent and reliable judges of mining property before making the decision upon which you are to base your report. You can not be too particular and specific in your report to give all the points upon which you base your decision, such as the location and extent of the mine, width of the lead and quality of the ore, the amount of work that has been done on the mine, the title, cost of wood, water facilities, and every other favorable or unfavorable circumstance that you may learn in connection therewith. You will of course, make a clear and explicit statement or estimate of the amount and cost of all the machinery that you may need to put the property in working and paying order, and probable time required to accomplish the work. You are aware, from the repeated conversations you have had with us, that in going into an enterprise of the nature specified herewith our object is to obtain, with the least possible outlay, a large paying property, and that we do not wish to be subjected to any experimental scheme, or even to place our money in certain small paying investments. We are confident that there are abundant opportunities to secure properties that will return us from 50 to 100 per cent. per annum on our money, and it is such as these that it is desirable you should secure." "The matter of your compensation is to be left to be arranged in the future. All it is necessary for us to remark in this connection is, that we are disposed to do justly by you and pay you as well as others are paid occupying similar positions, and assure you we can not believe there will be any difficulties arising upon this point. In corresponding with us you will please address your communications to Mr. Maguire. In conclusion, you are to understand that,

whatever property we decide to accept, it is with the understanding that you are to act as the general superintendent and chief manager." This letter was written with the assent of all the defendants, and \$500 was subscribed by the defendants and delivered to the plaintiff on June 20, 1866.

The report found that the plaintiff consented to go, on the assurance that his expenses should be paid by the subscribers to the agreement, made by a person professing to be authorized by the defendants, but, in truth, not so authorized; that "the plaintiff sailed from New York for California, June 21, 1866, and returned to New York about December 25, 1866, and during all that time was fully and properly employed in making the passage to and from California and in rendering services in California under the agreement and letter of instructions; that on his arrival in California he proceeded with diligence and in good faith, and with competent skill and judgment, to make investigation as to mining properties in different parts of the country, and personally to inspect numerous mines, for the purpose of selecting one which should be suitable for purchase and acceptable to his associates; and that in all his doings he conducted himself with entire fidelity to their interest."

The plaintiff, in August, 1866, recommended to the defendants by letter the purchase of three mining estates, but the defendants, on receipt of the letter, notified him by telegraph that the subscribers declined to accept the recommendation and decided to abandon the scheme entirely; and the report found that the defendants abandoned the scheme, not for the reason that the property recommended for purchase was not within the original scope of their association, but "because the defendants from caprice, or from distrust of the plaintiff, or from a more mature and deliberate reflection, had determined not to invest in a mining operation under his direction."

The report found that the plaintiff's charges "for the fair and reasonable expenses" incurred by him as agent for the subscribers, were correct, with the exception that \$78.45 were expended after he had notice of the abandonment of the scheme; and that his services were worth \$300 a month, or \$1,800 in all. The substance of the defendants' exceptions to the report appears in the opinion.

C. ALLEN and W. G. COLBURN, for the plaintiff.

A. A. RANNEY, for the defendants.

AMES, J.

The agreement under which these parties have acted, although it left it entirely at the discretion of the subscribers, upon the receipt of the report which the plaintiff was to make, whether they would prosecute or abandon the contemplated mining operation, was an unconditional stipulation that the preliminary investigations in California should be made by the plaintiff on their joint account, and for their joint benefit. It must have been understood that this investigation would occupy a considerable length of time, and would be attended with considerable expense. The instructions to the plaintiff required that he should "visit the mines in the various localities," that he should obtain the opinion and aid of "competent and reliable judges of mining property," that he should make a thorough and careful examination, and should make a report, in which, he was told, he could not be "too particular and specific" in giving all the points upon which he should base his decision. He was to find a valuable property, and to furnish them with such information respecting it that they should be able to judge for themselves whether it would be for their interest to go on with the enterprise. The report finds that he accordingly went to California, and "proceeded with diligence and in good faith, and with competent skill and judgment," to execute his commission; that his charges for his "fair and reasonable expenses" as such agent are correct, and that six months of his time were "fully and properly" occupied in making the journey and rendering the services required by his instructions. The association saw fit not to make the investment which he advised. It has had, however the benefit of his services and expenditures, and should equitably be charged with them, unless some reason why they should not be so charged can be found in the terms of the association, or in the letter of instructions, or in the legal relations of the parties to each other.

The defendants insist that the proper inference from the

language of those documents must be that the plaintiff was not entitled to anything on account of his expenses beyond the sum of \$500, which they have already paid; and that he was to receive no compensation whatever for his time and services in any event, unless a majority of the subscribers should accept the mining property which he should bargain for and recommend, and unless they should also determine to erect machinery upon the property and put it in working order. But we do not so construe the contract. The stipulation that they should pay the sum of \$100 each was in order to defray his traveling expenses "to California," and that sum was barely sufficient to pay the expense of traveling to San Francisco and back, leaving little or nothing for the expense of visiting the mines and doing the business, which was the sole object of the journey. Under the contract that amount was due on demand and in advance before he had started on the journey. There is nothing that indicates that he was expected to keep his expenses within that sum, or that the expenses in California were to be at his exclusive cost, and it appears that he did not start upon the journey upon any such understanding. We see no ground whatever for the claim that the payment of \$100 each was to be understood as relieving the defendants from any further payment necessary to complete their equal and just proportion of the plaintiff's fair and reasonable expenses in the execution of his commission.

With regard to the compensation for the plaintiff's services, it is true that with the exception of the general profession of a disposition to deal justly with him, and to have no difficulty on the subject, the only express promise refers to a state of things which has not arisen. If it should be decided to erect machinery upon the property which he should select and recommend, the question of his "salary" was to be left open, to be decided when he should have placed the mill and property in working order. The letter assures him that he should be paid as well as others occupying similar positions; "whatever property we decide to accept, it is with the understanding that you are to act as the general superintendent and chief manager." It appears to us that all these expressions must be understood as indicating what the association would be willing

to do if they should adopt the plaintiff's recommendation and go forward with the enterprise; and that they do not refer and are not applicable to the contingency, which has actually occurred, of a breaking down of the scheme in consequence of their refusal to go on with it. The contract and the letter are both entirely silent as to what is to be done in that event. A promise to pay a regular salary to the plaintiff as the superintendent and manager of a proposed business, if it should be decided to go into it at all, does not necessarily import that if the project should be given up he is not to be paid for valuable services, rendered at their request, in obtaining and reporting the information upon which they are to found their decision. We find nothing in the contract or the instructions which, either in express terms or by necessary implication, imports that the plaintiff was to work for nothing if the enterprise fell through. He undoubtedly expected to obtain the position of superintendent if the scheme should be carried out, and was willing to risk something under that expectation; but we see no ground for saying that he ever agreed to take upon himself more than his just and equal proportion of the loss upon the failure of the enterprise.

The objection that one partner in a joint adventure can not charge a compensation for his services in the joint business does not appear to us to be applicable to the case. The subscribers to the contract had not become partners in a joint undertaking when the plaintiff started on his journey, and it was wholly uncertain whether they would become so or not. It was thought necessary before deciding that question, that certain information should be obtained and laid before them, and they accordingly made the plaintiff their agent to do the whole of that needful preliminary business. A compensation is necessarily and equitably implied under such a special arrangement, and they stand in the same position as if they had employed a stranger: *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Bradley v. Chamberlin*, 16 Verm. 613.

Our conclusion therefore is, that with the exception of the charge of \$78.45, expended after he had received notice by telegraph of the proposed abandonment of the scheme, the plaintiff is entitled to recover of the defendants five sixths of

the amount of the expenses charged and allowed by the master, less the sum of \$500 already paid by his associates, and \$100 chargeable as his proportion of the advance; and also five sixths of the sum of \$1,800 allowed by the master for his services, with interest and costs.

Decree accordingly.

MURLEY V. ENNIS.

(2 Colorado, 300. Supreme Court, 1874.)

A defendant's admission of a fact is not conclusive upon him, but it is to be weighed by the jury in connection with all other evidence in the case.

Variance. If the plaintiff has not declared for money paid to the use of the defendant, he can not have an action therefor.

¹**Prospecting contract need not be in writing.** An agreement between two or more persons to explore the public domain and discover and locate lodes for the joint benefit of all is not within the Statute of Frauds, and it is not necessary that it should be written.

²**Citizen may locate by agent.** Any citizen who is entitled to locate a lode on the public domain may perform all necessary acts of appropriation and development through the agency of others.

Reasonable time to perfect location. Upon discovering a lode the locator is allowed a reasonable length of time in which to perfect the development which the local law requires of him.

Title prior to record. While holding possession, for the purpose of making the development required by law, the locator's right to the lode is complete, and it can not be conveyed except by deed.

Idem—Abandonment. It may nevertheless be lost by abandonment, or yielding possession to another, which is the same thing.

Idem—Admitting new party into possession. And so if the locator admits another into possession with him, this will amount to an abandonment *pro tanto*, and a retaking by the party admitted, upon which they will become interested in the lode jointly or otherwise, according to the terms of their agreement.

Idem No distinction as to re-located claim. In these particulars the rule is the same when applied to the location of an abandoned claim.

Remedy when prospector has transferred the entire title. If one in pos-

¹ *Hirbour v. Keeding*, 11 M. R. 514.

² *Morton v. Solambo Co.*, 4 M. R. 463.

session of a lode, holding for himself and another, make a sale of the property, the latter may bring ejectment against the purchaser for his part, or he may affirm the sale and sue his associate *in assumpsit* for his part of the purchase money.

Outfitter failing to keep up supplies, the prospector may abandon. If two persons agree with a third to furnish necessary supplies to the latter as the same shall be required for discovering and locating lodes for the joint benefit of all, the latter may treat this as a condition precedent, and upon failure to furnish the supplies he may abandon the enterprise, or he may proceed to discover and locate lodes in his own right, without regard to the contract.

Error to Probate Court, Clear Creek County.

The declaration contained the common counts for goods sold and delivered, for work done and materials furnished, for money loaned, for money received by defendant for use of plaintiff, for interest, for money found to be due upon an account stated. There was no count for money paid to the use of defendant. At the trial, Ennis, the present defendant in error, who was then plaintiff, gave evidence tending to prove an agreement between Murley, the plaintiff in error, one Thompson and himself, by which Murley was to prospect for lodes and the others were to furnish provisions and other supplies to him; that under this arrangement Murley took possession of the St. Joe lode, which had been previously located and abandoned by other parties; that by the terms of their agreement each was to have one third of all locations made by Murley; that Ennis and Thompson furnished to Murley about \$200 worth of provisions under this arrangement; that Murley afterward sold and conveyed the St. Joe lode to one McAfee, and received therefor about \$960; that Murley afterward promised to pay plaintiff one third of the money so received from McAfee, and gave to plaintiff an order on McAfee for \$310, being a portion of the said purchase money; that this order was returned to Murley with the request that he would collect the same. The plaintiff gave further evidence to show that in the year 1868, at Murley's request, he paid to one Morgan the sum of \$70. The defendant gave evidence controverting that offered by the plaintiff,

which it is unnecessary to repeat. The court charged the jury as follows:

1. If the jury believe, from the evidence, that Murley did have an accounting with Ennis and give him an order for the amount as due on the sale of the St. Joe lode, and such order not paid, he is now estopped from denying his liability to Ennis, unless by subsequent payment.

2. This is a civil suit; therefore the jury will be governed by the weight or preponderance of evidence in determining whether or not the defendant is indebted to the plaintiff.

3. If the jury believe, from the evidence, that at the time the alleged contract for prospecting was made, Murley was in possession of St. Joe lode, and that this St. Joe lode was not included in that arrangement, then the jury should find for the defendant. But admissions of the defendant as to any portion of the sale money belonging to the plaintiff, is good evidence to prove that the lode was included in the alleged contract.

4. The court instructs the jury that a contract broken releases the other party from its terms; and if they believe that the plaintiff and defendant did enter into some kind of a contract or arrangement for prospecting or working any mining property, and that the plaintiff did not carry out his portion of said contract, then the defendant is released from the operations of any such contract; but if afterward there was a settlement and accounting between the parties, and settlement made as to the matters relating to such contract, and the defendant acknowledged his indebtedness to the plaintiff, then the defendant is bound by such accounting and such agreement.

5. The court instructs the jury that a contract between the plaintiff and defendant to prospect in partnership, for mines, gives the plaintiff no right to or interest in mines previously discovered and owned by defendant, unless afterward, or at the time the contract was made, such mines were included in such contract.

6. If the jury believe, from the evidence, that in the spring of 1867 the defendant and plaintiff entered into an arrangement for prospecting, and were to share in the pro-

ceeds, this gives the plaintiff no right to or interest in property subsequently found by defendant, unless he, the plaintiff, carried out his part of the agreement.

7. If the jury believe, from the evidence, that the defendant is indebted to the plaintiff for money on account of sale of St. Joe lode, then the plaintiff is entitled to interest at ten per cent. per annum from the date of settlement about the matter with plaintiff, to the present date.

8. If the jury believe, from the evidence, that Murley is indebted to Ennis for money paid to Morgan, as attorney, then Ennis is entitled to interest on the same from the time the money was paid, to this date, at ten per cent. per annum.

To the giving of which said instructions (except the 6th) by the court, and to the giving of each of them, the defendant then and there excepted.

The jury found for the plaintiff, and judgment was given on the verdict.

HUGH BUTLER, for plaintiff in error.

POST & COULTER, for defendant in error.

WELLS, J.

We are of opinion that the supposed accounting and promise to pay referred to in the first instruction which was given, amounted to no more than an admission of liability, and was entitled to only such consideration as the jury might see fit to accord to it in view of the other testimony. If, in truth, Ennis had no interest in the proceeds of the lode in question, then the alleged promise was without consideration and void, but by this instruction the jury are required to give it conclusive effect; the fourth asserts substantially the same proposition. The eighth authorizes the jury to allow, in the computation of plaintiff's damages, interest upon a sum of money said to have been paid plaintiff to defendant's use; the declaration contained no allegation under which even the principal sum so paid could be recovered. Other points in the charge of the court are perhaps liable to exception, but for the error mentioned the judgment must be reversed.

Inasmuch as the cause must be tried again, it will be best that, for the guidance of the lower court, we express ourselves upon the substantial questions which were agitated upon the former trial.

If two or more go into the public domain together to search and explore for mines, with the agreement to occupy and develop such discoveries as may be made for the joint benefit, and such discovery, development and joint occupation follow, it is clear that while each explorer becomes invested with his due share and estate in the premises, no provision of the Statute of Frauds is violated. The eighth section, which was relied upon in argument, applies strictly to contracts of sale. But, in the case supposed, neither of the parties has, at the date of the association, any interest or estate which can be the subject of sale, and the contract of association does not contemplate that either shall part with any. Nor does the interest or estate which is afterward acquired, vest or inure by virtue of the agreement, but by the occupation and appropriation alone. The terms of the association may, it is true, be referred to, to ascertain the respective rights and interests of the occupants when controversy arises as to these, but this does not at all impair the force of the last proposition. Each associate is the agent of all the others, and every act done by either about the joint adventure is the act of all. In such case, as in the case of partnership transactions, the effect of the contract of association is simply to fix the terms of the agency and to determine how far each may be said to act for himself, and how far for his co-adventurers. Such contract of association is merely the creation of an agency in each of those contracting, and is no more a violation of law than a contract of partnership or association in any lawful calling. The contract of association is equally valid, although, by the terms thereof, one of the associates is to conduct the exploration and perform the work of development, while the others provide and furnish the supplies necessary. Any citizen entitled to avail himself of the privileges conferred by the acts of Congress in this behalf, may well appoint an agent to do for him all that he might do in his own person. The act of appropriating and developing the mineral deposits of the public domain may as well be performed by another as by the appropriator in his own person: *Gore v. McBrayer*, 18 Cal. 583.

But if one acting for himself alone discovers in the public domain a mineral deposit, such as mentioned in the acts of Congress, he, by virtue of his discovery, merely becomes entitled to a reasonable length of time in which to perfect the development which the local law requires of him ; and in the meantime he must be permitted to retain the possession of the premises without interference. His right while he proceeds with the work of development is as absolute as after the development is completed.

The same is true where one enters upon a mine previously discovered, and to which the discoverer has lost his right by failing to make the development required by the law ; from the moment of commencing the labor of development with the *bona fide* purpose to complete it, and so appropriate the mine, the party has a possession in fact, and for the time being a right to retain that possession. And this right is, perhaps, such an interest in land as can not be contracted for or disposed of without writing: Brown on Stat. of Frauds, § 231. Nevertheless it may be lost by an abandonment, as all must agree ; for the right, while absolute in the present, exists as to the future only upon condition that the occupant shall perfect the improvement which the law requires, proceeding with reasonable diligence therein ; so that if he desert the premises, though but for a moment, with intent not to resume his labors, his right is gone. So if without writing he yield up the possession to another, the right, which before was in him, passes to his successor in possession ; or rather the right of the first occupant is gone by abandonment ; and by virtue of his occupancy a new right has arisen in him who succeeds. And so, if the first occupant, while his right is still incipient, admit another into possession with him, upon the agreement that the labor of development shall be performed by the two for their common benefit, this amounts to an abandonment *pro tanto*, and if the development be afterward perfected by their joint labors, the better right, which is thereby acquired, inures to the two jointly. The case is not different where the first occupant, pending the labor of development, agrees for a consideration to proceed therewith for himself and another jointly, for such undertaking amounts to an abandonment as to such interest in the premises as he agrees shall inure to that

other, and creates an agency, also, whereby every blow thereafter stricken is the act both of him and of his associate. The law will not permit him to put off the agency which, for a valuable consideration, he has assumed. From the moment of entering into such an agreement his occupancy is not only his but another's also, and the right given thereby is given to both. And if one so occupying for himself and another afterward avail himself of his sole possession to turn the estate into money, his associate may either bring ejectment against the purchaser for his interest and share in the realty, or may at his election affirm what has been done, and treat the money, or so much thereof as may be proportionate to his interest in the premises, as money received to his use; in which case, even without any express promise, assumpsit will lie therefor. But here there was evidence of an express promise, which certainly rests upon sufficient consideration. The defendant below gave evidence tending to show an omission by plaintiff and Thompson to provide the supplies for which, by the terms of the contract, they had become bound. As to this phase of the case, the rights of the parties would seem to depend upon the following considerations: If, by the understanding of the parties, Ennis and Thompson were to provide all supplies necessary to the prosecution of the work of development upon the lode, as the same might from time to time be required, then performance upon their part was a condition precedent to the obligation of Murley to perform; and their failure would, it would seem, authorize him to treat the whole adventure as abandoned. He might then lawfully desert the work and proceed about his other affairs; or, inasmuch as the default of Ennis and Thompson could not have the effect to compel him to abandon his right in the premises, he might with equal propriety proceed with and perfect the development of the lode upon his own account. And if he did so, plaintiff can not be heard to insist upon any benefit under the contract, which he himself had voluntarily abandoned. Whether plaintiff might lawfully claim in such case to be remunerated for what supplies were furnished under the contract, it will probably not be necessary to inquire, inasmuch as all the evidence tending to show a default on the part of the plaintiff tends also to show that the defendant, before this

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action, had repaid all advances made, and the jury will probably accept or reject it in whole. What has been said seems to be a sufficient expression of the views of this court upon all the questions likely to arise in the second trial.

The judgment is reversed, and the cause remanded.

Reversed.

THE NORTH GEORGIA MINING CO. v. LATIMER.

(51 Georgia, 47. Supreme Court, 1874.)

Interested witness—Decease of one of opposite party. In a case arising out of a contract, signed by A, of the one part, and by B, C, D, E and F, of the other part, all being present and engaged in fixing the terms, A is not an incompetent witness because one of the parties of the other part has since died.

¹**Specific performance, when not discretionary.** When a contract for the sale of land is in writing, fair in all its parts, certain and for an adequate consideration, its specific performance becomes a matter of course; it ceases to be discretionary.

²**Adequacy of consideration in prospecting contracts.** Considering the uncertain nature of undeveloped mineral land, a contract to prove it at the prospector's sole cost, which he loses if no mineral be found, he to receive a conveyance of three fourths of the land if mineral is found, would not be unreasonable. It is the prospectors who take the greater risk. And a contract whereby the owner agrees beforehand to sell to the prospector at a certain sum in case mineral be found, is just and reasonable, although such sum appears after the discovery is made to be much less than what the mine discovered is really worth.

Facts of the case—Stock. A land owner entered into a contract by which his land was to be prospected for copper. If a copper mine were found equal to the Ducktown mines, he agreed to take \$50,000 for the land or more or less as it might be estimated to be better or worse than the Ducktown mines. After the mine was found he agreed to convey to a company, he taking his pay in \$75,000 out of the \$300,000 capital stock. *Held*, that the risk assumed and outlay expended by the prospector, were adequate consideration for the land owner thus parting with three fourths of his interest.

The North Georgia Mining Company filed its bill against Charles Latimer, making substantially the following case:

The defendant, being the owner of lot of land number twenty, in the ninth district of the second section of originally

¹ *Haywood v. Cope*, 6 M. R. 500.

² *Bean v. Valle*, 13 M. R. —.

Cherokee, now Fannin county, supposed to contain valuable mineral deposits, leased the same with a conditional right of purchase, to R. G. A. Love and William Johnston, of the State of North Carolina, on March 17, 1854, and said lessees on the 17th day of the succeeding June, sold their said lease and contract of purchase to Edward M. Gault and Benjamin Johnston, who afterward became associated with Nimrod S. Jarrett in testing said property, by which said Love and Johnston reserved to themselves one fourth interest therein for the expense of testing the same. Gault, Johnston and Jarrett having discovered a vein of copper on said property which was considered valuable, and being desirous of fulfilling their contract to pay for the same, to wit: on Jan. 22, 1856, proposed to the other parties interested, to wit: the defendant, R. G. A. Love and William Johnston, the formation of a joint stock company, which proposition was accepted and the following agreement entered into:

DALTON, STATE OF GEORGIA, January 22, 1856.

Whereas, on the 17th of March, 1854, R. G. A. Love and William Johnston, of North Carolina, obtained from Charles Latimer, of DeKalb county, in the State aforesaid, a lease with a condition of purchase, on a lot of land lying and being in the ninth district and second section of originally Cherokee, now Fannin county, Georgia, being lot number twenty and supposed to contain minerals of value; and whereas, on the 17th day of June following the date of said instrument, the said R. G. A. Love and William Johnston sold their said lease and contract of purchase to Edward M. Gault and Benjamin Johnston, of the State aforesaid, who afterward became associated with Nimrod S. Jarrett, of Macon county, North Carolina, in testing the said property, by which the said Love and Johnston reserved to themselves one fourth of said property, free from the expense of testing the same, and the said Gault, Johnston and Jarrett became liable to pay the said Charles Latimer the purchase money of said property; and whereas, the said Gault, Johnston and Jarrett have discovered a vein of copper ore on said property, which they have opened in two several places, which is considered as valuable, and desirous of fulfilling their said contract of paying for the property, have proposed to the other parties interested a participation in the formation of a joint stock company on said property, as a final and full settle-

ment of the different interests therein, which was accepted by all the parties thereto on the following conditions, to wit: They agree to form a joint stock company on the same, with a capital stock of \$300,000, consisting of thirty thousand shares of \$10 each, of which the said Charles Latimer is to be the owner of seven thousand five hundred shares, as a full consideration of the price of said land. The said R. G. A. Love and William Johnston are to own three thousand seven hundred and fifty shares each, being one fourth of the capital stock, in pursuance of the sale made to said Gault and Benjamin Johnston, and the said William Johnston one thousand eight hundred and seventy-five shares in addition, purchased from Benjamin Johnston, making in all two thousand six hundred and twenty-five shares. The said Edward M. Gault is to own two thousand eight hundred and twelve and a half shares. The said Nimrod S. Jarrett is to own five thousand six hundred and twenty-five shares, and the said Benjamin Johnston is to own four thousand six hundred and eighty-seven and a half shares, and the said Charles Latimer is to execute to the said company such title as he possesses to the said lot of land, in whatever manner may be advised as legal, so soon as the charter can be obtained.

In testimony of which, all the parties thereto agreeing have hereunto set their hands and seals, date above written.

CHARLES LATIMER,	[L. S.]
R. G. A. LOVE,	[L. S.]
WILLIAM JOHNSTON,	[L. S.]
EDWARD M. GAULT,	[L. S.]
N. S. JARRETT,	[L. S.]
BENJAMIN JOHNSTON,	[L. S.] "

Complainant was incorporated by an act of the general assembly of the State of Georgia, approved March 1, 1856, with all the powers and privileges usually conferred upon mining companies; its charter will be found upon page 442 of the acts of 1855 and 1856. The capital stock of said corporation was made by said charter to consist of shares of the par value of \$500,000. It being considered to the interest of complainant to reduce the amount of the capital stock, the general assembly, by an act approved February 1, 1869, diminished the same to the sum of \$30,000. On account of the

heavy taxes imposed, and for other good reasons, the organization of said company was not perfected until the passage of said amendatory act. On June 23, 1869, the stockholders in said company met at the town of Dalton, according to previous notice and appointment, for the purpose of perfecting an organization of said company, at which time said stockholders adjourned to the 24th day of the same month. On the day last aforesaid, said company fully organized under said charter by the adoption of by-laws, and by the election of a board of directors and said directors subsequently elected a president and bookkeeper, whereby the organization of complainant became complete. Complainant thus became entitled to a specific performance of the hereinbefore recited contract on the part of said defendant. He, though often requested, has hitherto refused and does now refuse, to execute a title to said lot of land to complainant. Prayer for specific performance. All discovery waived. The answer of the defendant being simply pleading, is omitted. The complainant introduced the following evidence :

1st. The Dalton contract of January 22, 1856, set forth in the bill.

2d. The Cartersville contract of April 3, 1856, as follows:

“CARTERSVILLE, GEORGIA, April 3d, 1856.

This agreement between the undersigned members of the company interested in lot of land known as number twenty, ninth district and seventh section of Fannin county, Georgia, witnesseth; that N. S. Jarrett, Edward M. Gault, Charles Latimer are hereby appointed as agents to sell the property in question under the following regulations, conditions and restrictions, that is to say: they are not to sell said property under the price of \$135,000 unless further advised; they are to receive as commission for selling, in the event of a sale, five per cent. on the same sum of \$135,000; for any sum over that amount, not exceeding \$200,000, seven and one half per cent., and for any sum over \$200,000, ten per cent. out of the sale made, whether in cash, stock or otherwise, in the same manner as the condition of the sale is made; and in the event of no sale being effected, the company is to bear the expense of traveling and incidental expenses and board in proportion to the stock owned by each individual in the company, as made

known in the articles of agreement entered into at Dalton, on 22d of June last, and each person named therein to receive his proportion of the price, on payment of said property in like manner, according to the amount of shares held therein, whether in cash, stocks, notes or otherwise. It is further understood that in making sales the said agents are to have power to procure the services of any agent or assistants they may deem proper and expedient, for the payment of which, together with any other contingent expenses, in the event of an actual and *bona fide* sale being made, shall fall on the whole company alike, in proportion to their respective shares, provided the net amount of sales, after deducting the same, shall not fall under \$135,000, but otherwise the agents only are responsible. And further, it is understood and agreed on, that in case said agents shall fail to effect a sale under the present arrangements, and shall be advised and believe that an organization under the present charter would enable them to consummate the same, the parties hereto are to meet at this place, or elsewhere agreed on, either by themselves, or attorney or *proxy*, and organize with as little delay as possible, on reasonable notice being given to the parties by said agents. In pursuance of the above, a power of attorney, signed by the other members of the company, authorizing and empowering the said agents to carry out the objects set forth in the foregoing agreement, is to be forthwith executed and delivered to said agents.

In testimony of which, all the parties interested have hereunto set their hands and affixed their seals, date before written.

(Same signatures and seals as the Dalton contract.)

3d. The power of attorney executed by defendant to Thomas L. Clingman to sell said lot, with the approval of the other parties interested therein, as follows:

“GEORGIA, FULTON COUNTY:

This is to certify and make known to all whom it may concern that I have this day authorized and empowered Thomas L. Clingman to sell lot of land number twenty, ninth district, and second section of originally Cherokee, now Fannin county, Georgia, containing one hundred and sixty acres, (those owning equitable interests therein approving and con-

curing) for \$100,000. Now I agree (those owning equitable interests in said lot, as per contract signed and sealed at Dalton, State aforesaid, on the 22d day of January, 1856, approving and concurring therein,) that the said T. L. Clingman is to retain and keep, for his own proper use and benefit, every dollar for which he may sell said lot of land for, over and above \$100,000, whatever that sum may be. This is to be in consideration of said T. L. Clingman's services in the premises.

In witness whereof I have hereunto set my hand and seal,
May 22, 1866.

CHARLES LATIMER. [L. S.]

We approve and ratify the above. R. G. A. LOVE,
J. A. R. HANKS.

Adminstrator of estate of E. M. Gault, deceased.
N. S. JARRETT,
BENJAMIN JOHNSTON,
WILLIAM JOHNSTON,
by Benjamin Johnston.

" We, Benjamin Johnston, for myself and Benjamin Johnston, as agent for William Johnston, and N. S. Jarrett and J. A. R. Hanks, administrator of the estate of E. M. Gault, and R. G. A. Love, those owning equitable interests in said lot of land, as per contract signed and sealed in Dalton, Georgia, on the 22d day of January, 1856, do agree and approve of the power of attorney to sell said lot of land number twenty, ninth district and second section of originally Cherokee, now Fannin county, containing one hundred and sixty acres, upon the terms and conditions expressed in said power of attorney, to T. L. Clingman, of Buncombe county, North Carolina.

R. G. A. LOVE,
BENJAMIN JOHNSTON,
WILLIAM JOHNSTON,
by Benjamin Johnston.
N. S. JARRETT,
J. A. R. HANKS.

Administrator of E. M. Gault, by R. G. A. Love."

4th. The charter of the complainant and the act of 1869, amendatory thereto.

5th. The minutes of complainant showing its organization on June 24, 1869.

6th. J. A. R. Hanks sworn. As the administrator of E. M. Gault he was invited to meet the other parties in Atlanta, in 1866. He, Jarrett, Love, Benjamin Johnston and defendant, met at the city aforesaid, and the power of attorney to Clingman was executed by defendant. Witness wrote the power, and read it to defendant and the other parties. Defendant signed it without objection or condition other than it expressed. At this meeting the subject of the organization of the company was discussed. The amount of taxation which an organization under the original charter would involve was urged as a reason why an amendment to the charter should be procured and the capital reduced, so that, in the event Clingman failed to sell the property, the company could at once organize without incurring such heavy and onerous taxation. Witness can not say positively that the defendant was present at the discussion of this question. He thinks that defendant and the other parties were together for several hours. Witness was requested to procure an amendment to the charter reducing the capital stock to \$30,000, but does not recollect that the defendant joined in said request. Supposes he drew the bill himself. He handed to defendant a written notice of the proposed meeting in Dalton to organize the company. This notice was handed to defendant on June 12, 1869, and the meeting was on the 23d of the same month. Witness had other interviews with the defendant. Never, at any time, heard him say or intimate that any fraud, mistake, or omission had incurred in the execution of the Dalton contract of January 22, 1856. Since the organization of the company at Dalton on June 24, 1869, there has been no regular meeting of the members or directors. E. M. Gault died in February or March, 1866.

The complainant closed. The defendant introduced the following testimony :

1st. An instrument, as follows:

Whereas, R. G. A. Love, of Haywood, North Carolina, hath this day, 17th of March, 1854, made known a desire to enter upon a lot of land owned by me, which lot of land is known as number twenty, district ninth, section second, originally Cherokee county, Georgia, and afterward Gilmer county, on the waters of Fighting Town Creek, and test for minerals with a condition of purchasing the same:

These are therefore to certify and make known to all whom it may concern, that I have given, and by these presents do give the said Love privilege to do so, and he is to prosecute the test vigorously as soon as he can do so with safety to himself, owing to litigation being going on at this time about said lot of land, with these conditions :

After the said Love gets possession, he is to prosecute the test vigorously and in good faith, and he is to have a reasonable time to complete it in, and when completed, if the lot of land aforesaid should prove to have and contain as valuable a vein of copper ore as the average mines in Ducktown, Polk county, Tennessee, the said Love agrees to pay me the sum of \$50,000 for it; and I agree and hereby bind myself, my heirs, executors and administrators, to make him or his heirs a good and sufficient deed of conveyance for the same, with everything appertaining to it. And if the lot of land should, after it is thus tested and developed, prove to have a better and more valuable copper vein than the average mines in Ducktown, Tennessee, now open and in operation, the price of the mine is to be raised in proportion as its value is over the value of the average mines in Ducktown, Tennessee; and if, after being tested and developed as aforesaid, it should turn out not to have and contain as valuable a vein of copper ore as the average copper mines now opened and in operation in Ducktown, Polk county, Tennessee, the price of the said lot of land is to be reduced in proportion to its want of value or falling off, compared with them. When the mine is thus tested and its price fixed, the said Love agrees either to take it at the price that may be agreed upon, or go off of it, lose his labor, and give me full possession of the same. If the said Love and myself can not agree upon the comparative value of the mine, we agree to leave it to disinterested, scientific men, such as may be agreed upon by us. And if he agrees to take it, he is to pay me the full amount in twelve equal monthly installments, with good and sufficient security to his notes, that he faithfully performs and meets the payments. The title of the said lot of land is to remain in me until each and all installments are paid, then I am to execute the title to the said Love, as aforesaid.

In witness whereof, I have hereunto set my hand and affixed my seal, on the day and date above written.

CHARLES LATIMER. [L. S.]

R. G. A. LOVE. [L. S.]”

2d. Charles Latimer, the defendant, next offered himself as a witness. It was objected to his competency that E. M. Gault, one of the parties to said Dalton contract of January 22, 1856, and one of the stockholders of complainant, was dead. The objection was overruled and complainant excepted.

He testified substantially as follows: At the time he entered into the contract of 17th of March, 1854, with Love, he did not know William Johnston. Does not know how Gault, Benjamin J. Johnston and Jarrett acquired an interest in said contract. Never consented to take them for the purchase money mentioned in said contract in lieu of Love. Was informed by Love at the time of said contract that a man by the name of Nimrod S. Jarrett set up some sort of a claim to said land. Was informed by Gault, Benjamin Johnston and Jarrett that they had tested said land in two places and had discovered copper ore, and that they thought the mine rich and valuable. Defendant never made any objection nor consented to the assignment of the contract with Love to said Gault, Benjamin Johnston and Jarrett; he was never consulted with reference to the same. After the copper ore was discovered, Benjamin Johnston and Gault, invited witness to meet the parties at Dalton on January 22, 1856, to arrange and settle the various interests under said contract with Love. He met the appointment, taking his little son with him. On the way to Dalton his child was taken sick, threatened with pneumonia, and after their arrival at that point, seemed to grow rapidly worse. He met at Dalton, Love, William Johnston, Gault, Benjamin Johnston and Nimrod S. Jarrett. The discovery of copper on the lot had rendered it, as all supposed, very valuable, but he had always had such an opinion of the property. Various suggestions were made and propositions submitted, some stating that it was the custom of the country in the mining region for those who made tests and discovered copper to have a one half interest in the land. Defendant would not consent to this suggestion. He insisted, as his ultimatum, that he must receive \$50,000 for the lot; also, that under his contract with Love

they were not entitled to anything for testing. This discussion continued until a late hour in the night. His son was so sick that he felt great uneasiness about him. He was passing frequently to and from his son's room, whilst the discussion was going on. Finally, at a late hour of the night, some one proposed the formation of a joint stock company as the best way of settling the various interests. This was consented to, and William Johnston was appointed to draw up the agreement. He performed this service and read the agreement in an audible and distinct tone to the parties before mentioned, after which it was signed. After the signatures were attached, some one present said something about each one of the parties taking a copy. On the next morning some one handed to him a copy of the contract. It was late at night when said contract was signed; in fact, it was about four o'clock the next morning, and witness' mind was much disturbed during the whole discussion on account of the condition of his son. He insisted, as his ultimatum, that he must have \$50,000 for the land, but the other parties insisted that they did not then have the money. He refused to yield this point, and it was finally the understanding of all the parties that he was to have the \$50,000 certain, and, as they were not then able to pay that amount, he urged that he ought to have something for the delay which had already taken place, and which would take place, in the payment thereof. It was then agreed that he was to have one fourth of the stock over and above the \$50,000 to remunerate him for the delay. Witness insisted, from the beginning unto the end of said discussion, that he was entitled to stand upon said contract with Love, and that said \$50,000 was to be paid out of the first stock of the company sold, and enough stock was to be sold to pay said sum, even if it took all of it. He did not observe that this stipulation was not in said contract when he signed it. Did not read the copy furnished to him until the next day, just before his arrival at the town of Cartersville, at which place he intended to stop to take his sick son to his daughter's house. He then, for the first time, discovered the omission. He did not return and notify the other parties of the mistake, for the reason that when he left Dalton they had their horses saddled, were cloaked and about to start. Knew where each and all of said parties lived, but never wrote to them

or either of them about any mistake or error in said contract. Met said parties again at Cartersville on April 3, 1856. Went with Gault and Jarrett to Savannah to sell said land, under the Cartersville agreement. Saw William Johnston at Morganton, and saw all the parties at the Atlanta meeting, in May, 1866, but never, at any time or in any way, said or intimated to said parties, or either of them, that there was any mistake or error in said Dalton contract. He was present at the Cartersville meeting, on April 3, 1856, and signed the contract of that date. Refused to accept the charter, because it fixed the capital stock at \$500,000, and this would make the taxes too onerous. It was therefore agreed to sell the land without an organization, under the charter if it could be done, in order to save taxes. Witness accepted the agency under that agreement and went to Savannah in company with Gault and Jarrett, and remained there eight or ten days, trying to sell said land. Attended the meeting at Atlanta in May, 1866. Did not consent to any amendment of said charter, or to any organization thereunder. Has been in very feeble health for fifteen or twenty years. Quit business some fifteen years ago on account of ill health. Rented the land in 1864 to one Phillips, for one year, for one half the profits. Received as rent for that year \$2,500. Is now seventy-five years of age. Believes the mine to be very valuable. No certificates of stock were ever issued or put on the market that witness ever heard of, and he can not, for this reason, give any opinion as to the value of the stock. Can not say that any fraud was practiced on him at the time of his signing the Dalton contract, or that William Johnston read it differently from what was written therein, but thought it contained his terms, as heretofore stated, or he would not have signed it. Did not give notice of any error or mistake in the Dalton contract, because he came to the conclusion in his own mind that they intended to practice a fraud on him at the time it was executed. He simply determined to make no deed until he was paid his \$50,000. At the Cartersville meeting, the parties notified defendant that they had appointed Gault and Jarrett to go to Savannah to sell the land, about which he was not consulted though he was there. Defendant told them that if they did not sell it to his notion he would not make a deed, and they then appointed him in connection with said Gault and Jarrett.

The defendant closed. The complainant introduced the answers of R. G. A. Love to a set of interrogatories substantially as follows: After examining the lot in controversy, he thought there was a fair chance of finding copper upon it, and learning that the defendant was the owner thereof he went to see him at his house in DeKalb county, Georgia. He stated to the defendant that it would require the expenditure of a good deal of money and time to make a satisfactory test of the resources of the lot, and that if the defendant would satisfy him for making the test, he and his partner, Mr. William Johnston, who were engaged at that time in hunting for copper, would make a search for the same. After some discussion the contract of lease was entered into. He has not a duplicate of said contract. When it was satisfied by the agreement entered into at Dalton, he lost sight of said paper, but does not remember whether it was handed to defendant, or destroyed, or what became of it. When he returned from DeKalb county he found one Nimrod S. Jarrett in possession of said lot under claim of title from some other person, and fearing that he would be put to great trouble in getting possession of the same, he sold his contract with defendant to Gault and Benjamin Johnston, who afterward became associated with Jarrett. They went to work on the lot, and after a very thorough examination found copper on it in two places. Was present at the Dalton meeting. The parties wished defendant, William Johnston and witness, to take steps to ascertain the value of the land, so that they could proceed to pay for it upon the terms provided in the aforesaid lease, and obtain a title. Some time was consumed in discussing how this value should be arrived at. A proposition was then made that a joint stock company be formed, with a capital of \$300,000, divided into thirty thousand shares of \$10 each, and that the defendant receive a certain number of shares as a full and final consideration for the land. This suggestion, after much discussion, was acquiesced in by all the parties, each agreeing to take his interest in stock. A contract to the above effect was consequently drawn and signed by all the parties. The land, exclusive of its mineral resources, is not worth more than \$100. It was by the labor and expense of Gault, Jarrett and Benjamin Johnston, under the contract of

William Johnston and himself, that its mineral wealth was developed. On the first occasion on which he met defendant after William Johnston and witness had sold their contract of lease to Gault and Benjamin Johnston, he mentioned this fact, and also told him that Gault and Benjamin Johnston had associated Jarrett with them, and in this way had settled his claim to the land. Defendant expressed himself well satisfied with the arrangement. The company instructed Gault, defendant and Jarrett to take steps to procure a charter. After our first meeting at Dalton we met at Cartersville, in the month of April following. We failed to organize under the charter which the general assembly had granted, for the reason that the market value of copper property was greatly reduced, and for the additional reason that we would be compelled to pay taxes on a valuation of \$500,000, the amount of the capital stock. The company did not work the mine for the reason that they desired to sell it, and for the further reason that the mine as developed showed very well, and they feared by working it might not show so well further down. These were substantially the views of each member of the company at every meeting at which the matter was discussed. Never heard the defendant say anything about an omission through fraud or mistake in the written agreement made at Dalton; never heard that he made any such pretensions until after this suit was brought. Saw him frequently after the Dalton meeting; was present when the power of attorney from defendant to Clingman to sell said property was executed. Defendant agreed to sign said instrument provided the other parties would give him an instrument approving his action in the premises. He stated that his obligation was out to make a title to the company when organized, and that the parties interested must approve his power of attorney to Clingman. We agreed to do so. Such an instrument was accordingly executed, and our approval placed thereon at the request of defendant.

Was present when the company organized under the act of incorporation and the amendment thereto. Three fourths of the entire stock was represented. William Johnston was not present when the contract of lease was made by defendant, but he thinks his name was inserted in it. If it was not, it

was certainly an oversight, because witness and defendant both understood that Johnston was interested in it. When the original contract with defendant was canceled, and the Dalton agreement entered into, it was either destroyed or handed to defendant. The Dalton contract was carefully read over, clause by clause, in the presence of all the parties before it was signed. The stock of the company was supposed by us to be worth \$300,000. The truth is, we all felt like we had made a fortune—we, by testing it, and defendant, by having it tested by us. The defendant received his pay in the labor and expense expended by the other parties on the property in testing it, in taking up the claim of Jarrett, and in canceling the contract which William Johnston and witness had on him. The amendment to the charter was procured by Hanks, the administrator of Gault, at the instance of all the parties interested. He was so authorized at the Atlanta meeting. The defendant was present at said meeting. If he was not present at the time the agreement as to the amendment of the charter was entered into, witness does not know the reason of his absence.

Also, the answers of William Johnston, of Benjamin Johnston, and of Nimrod S. Jarrett, to sets of interrogatories. They substantially corroborated the testimony of Love. The jury found for the defendant. The complainant moved for a new trial upon the following grounds, to-wit:

1st. Because the court erred in allowing the defendant to testify, Edward M. Gault, one of the parties to the contract executed at Dalton, Jan. 22, 1856, being dead.

2d. Because the court erred in refusing to charge the jury as follows: "When a contract for the sale of land is in writing, is fair and just in all its parts, is certain, is for an adequate consideration and capable of being performed, it is as much a matter of course for a court of equity to decree a specific performance of it, as it is for a court of law to give damages for it in other cases.

The motion was overruled, and complainant excepted.

W. H. DABNEY, J. A. R. HANKS, for plaintiff in error.

J. M. CALHOUN & SON; L. E. BLECKLEY by N. J. HAMMOND, for defendant.

McCAY, Judge.

1. My brother Trippe and myself join with the chief justice in holding that the death of one of these contractors does not exclude Mr. Latimer as a witness. In the first place, the party to the suit is a corporation, and the death of one of its members is not within either the letter or the spirit of the exceptions in the evidence act of 1866. Nor, as we think, does the case, even were the original contractors parties, come within the spirit of the exceptions. Here are several of the original contractors living who may and do confront Mr. Latimer, and the mischief intended to be guarded against by the exceptions does not at all exist.

2. It has long been the settled rule, both in this country and in England, that if a contract for land be in writing, and be fair in all its parts, certain and for an adequate consideration, it is as much a matter of course for equity to enforce it, as it is for a court of law to give damages for it in other cases. It is not a question of discretion. The party seeking redress has a *right*, and it is the duty of a court of equity to enforce it by decree. It is only when the contract is unfair or uncertain or the price inadequate, that the discretion to refuse arises: Code 3190. See *Chance v. Beall*, 20 Ga. 142, where the rule is fully and strongly stated.

3. In this case the contract is in writing, and whilst there is some evidence, to wit, that of Mr. Latimer, of fraud, yet we doubt if under the whole evidence that had much weight with the jury. It seems to us clear that the verdict turned on the charge of the court, "that the jury had a discretion to decree or refuse to decree specific performance." The judge refused to charge, on request, the principle we have alluded to. In the argument here it was admitted that this was the rule in the cases it covers. But it was contended that the case at bar did not authorize the charge, because the facts showed there was no consideration, or, at best, a very inadequate consideration. It was contended that the Dalton contract, the foundation of the bill, was without consideration; that the land belonged to Latimer at first, and that, in effect, this agreement was an agreement to give the plaintiff three fourths of his own land. The line of argument by which this strange conclusion is arrived at strikes me with astonishment. It is based

on the assumption that if A has a parcel of land and contracts with B that if he, B, will at his own risk develop a valuable mine upon it, he, B, may have three fourths of it, the agreement is without consideration. It is said the land and all that is on it belongs to A, and that as by such contract he only retains one fourth of it, he gives the other three fourths of it away. But those who reason thus forget that the minerals, though there, were hidden, and worthless because hidden; that it cost money, labor and *risk* to find them, and that the land gets its real value from the finding. There is just as much logic in saying that if one should agree to give one fourth of his land to one who should at his own expense clear it, this would be a gift. To my mind it is very clear that if I contract with a man to give him three fourths of a tract of land if he will go upon it and lay bare a valuable mine by his skill, labor and capital, I only give a fair *quid pro quo*. My land is of but little value. I am not willing to take the risk of expending money in sinking shafts, etc., and if I can get a man to take this risk, and to expend perhaps three times as much as my land is worth, I to run no risk, and he to lose his money if he fails, I may do a very good thing for myself. That his skill, labor and capital, in fact, do, if he succeeds, render my land more valuable in the market than it was before is unquestionable, and it seems to me absurd to say, if I make such a contract, that it is without consideration.

It is said that in this case it was the express contract that Love was to test the land at his own expense. Certainly; and it is that very stipulation which makes the consideration, or, at least, a large part of it. Love was to run *all the risk*. Had the agreement been that it was to be at Latimer's expense, Love's right to remuneration would be only for his labor or skill. But just because Love *was* to bear all the expense, and take *all the risk*—just because, if there was a failure, Love was to lose his time, labor, skill and money and Latimer to have the land *as it was before*, just for this reason, it would be fair, and just, and reasonable, that if Love *should* succeed, and by his risk and labor and skill make Latimer's land, with no work or labor of his own, of great value in the market, Love should reap a large share of the profits of the enterprise. Why should Love and his associates go to work

to develop Latimer's land? Why should *they* spend their time, money and skill upon it, if, when the prize was won, they were to turn the land over to Latimer, or pay him *the value of it*? Such conduct would be childish; an act of pure benevolence, that among business men would be laughed at as folly. On the other hand, I doubt if there be a man in Georgia, who owns a lot of land supposed to have minerals upon it, but which requires an outlay of \$2,500 to test, who would not be glad to give three fourths of it to one who by his labor, skill and investment upon it, would make it as valuable in the market as the Ducktown copper mines. And it is equally clear that there are very few men of any experience in such things who would be willing to risk \$2,500 in testing a lot, even under an agreement to get three fourths of it if the mineral was found. The truth is, that such things are so uncertain that the risk of so large a sum ought to insure a very large reward upon success. The true rule of division between the parties, on equitable principles, by which both would get equity, would be that the owner of land should have such a share as his investment, to wit, the value of his land before testing, with no risk of the loss of anything, is proportioned to the time, skill and money spent by the other party, with the risk of the loss of all. Whether this is one half, one fourth, one tenth, or any other fraction, would depend on circumstances, though ordinarily one fourth would, in my judgment, be a good share for the land owner. It does not appear positively what the parties supposed a lot equal to the Ducktown mines would be worth. The Love contract fixed, however, upon \$50,000 as Mr. Latimer's price for the land if it should be equal to those mines. And as all parties seem to have agreed that Mr. Latimer was entitled to his \$50,000, and as they also agreed the land was worth \$300,000, it won'd seem to follow that \$300,000 was what they supposed the land had been counted worth at the time the Love contract was made, should it turn out equal to Ducktown; \$50,000 is one sixth of \$300,000 and I do not believe there is a man in the State who would not be glad to give five sixths of any undeveloped lot to one who should *prove it*, by a test, at his own expense, to be equal to the Ducktown mines.

When, therefore, these parties met at Dalton, in 1856, it is a great mistake to say that this was Latimer's land. Under the

contract with Love the plaintiffs had acquired an equitable interest in it. They had the *right*, fairly acquired and honestly paid for, under a written agreement, to buy it at a price to be fixed by its relative value as compared with Ducktown. Had there been no Dalton contract, and this been a bill to compel the specific performance of the Love contract, how would the matter stand? Love was to test the land at his own expense. If he found copper he was to have a right to buy for \$50,000, in case he had found a Ducktown, and *for as much less as the mine should be of less value than the Ducktown*. The parties would, *without the Dalton contract*, have a right to a decree on the payment by the complainant of a sum bearing the same relation to \$50,000 as this lot bears to Ducktown. When they met at Dalton, the very first thing to settle was, what was the value of the new discovery as compared with the Ducktown mines? All parties seem to have agreed that the testing was a success; that the plaintiffs by their skill, labor and expenditure, had developed a valuable property out of a lot of land of but trifling value. It seems to have been agreed all around that \$50,000 was the price to be paid. Why? Because that was the value of the *land*? Evidently not. The very fixing of this price shows that they considered it equal to Ducktown, and so considering, that it was worth \$300,000. Yet by common consent, and by the written agreement with Love, Love and his associates had the *right* to buy for \$50,000. It follows, it seems to me, incontestably, that they all, including Mr. Latimer, recognized that the meaning of his contract with Love was, that if a valuable mine was found Love should have the right to buy it for one sixth of its value; that thus, and thus only, was Love to be compensated for his labor, skill, and *risk of the money* necessary to test it.

As I have said, I do not think this an unfair, but a just and reasonable contract, one that almost any owner of undeveloped mineral land would be willing to make, and one that but few speculators would care to go into on the other side. Latimer knew, and Love knew, that if a Ducktown mine was found, \$50,000, was but a small fraction of its value. But they also knew that there were large chances that Love would lose his time, his labor and his capital. No one who has ever heard or read of the uncertainties of such enterprises can hesitate as to

which party, under this Love contract, was taking the greatest risk. By the original contract, therefore, it is plain that if a mine of value was found Love had a right to buy the land at far less than would *then* be its value, and this for the plain reason that in such a case it would be his skill, labor and risk of capital that gave it value.

Assuming that this was the state of the case, how can it be said to be unfair to Mr. Latimer? How can it be called a foolish contract, or one not founded on an adequate consideration, if he agreed to take for his \$50,000 one fourth of the land, or one fourth of the stock of the company formed by the owners of the land? If they were right in their estimate he got \$75,000 instead of \$50,000 for his land, and if they were not right in their estimate *he was not entitled* to \$50,000. That sum was to be lessened according to the failure of the mine to come up to Ducktown. It was only on the presumption that the land was worth \$300,000 that he was to get \$50,000 for it. It seems to me absurd to say that this is not a fair discharge of the Love contract, and that instead of \$50,000 Mr. Latimer only gets stock, which is mere paper, and may be, perhaps is, worth nothing. If it be worth nothing, it is because the land is worth nothing. He was not by his contract to have \$50,000 at all events, but only if the land is equal to Ducktown. If it be equal to Ducktown, if it be worth a sum which would entitle him to \$50,000, his one fourth of the stock is worth \$75,000. True, it is not cash, and perhaps it may be a long time before he will get \$75,000 for it, but if so it will be only because it is not a Ducktown copper vein—only because he and they were mistaken in supposing he was entitled to \$50,000. He gets by the Dalton contract more than his contract with Love called for. He gets one fourth instead of one sixth of the land, and if he saw fit to take his \$50,000 in stock based upon the same estimate of the value of the land that fixed \$50,000 as his interest in it “after the mine was found,” is that unfair? I do not think so, and a jury might well think this Dalton contract was a fair and just one, based on an adequate consideration, according to the evidence of Mr. Latimer himself. He was the owner of a tract of land of but little value, save upon the idea that it contained a copper mine. It would cost a good deal to test it. As all experience

proves, money thus spent is generally thrown away, as valuable copper lots are very, very scarce. Mr. Love was ready to take the risk. *He* would spend his time, his labor and his money. If there was a failure, the loss was to be his, and his alone. Latimer ran no risk. It was but fair that the man who ran the risk should, if successful, get the largest share. They fixed Ducktown as the standard. If the test was a failure, Mr. Latimer lost nothing; he still had his land. But Love lost, as the proof shows, \$2,500. On the other hand, if a Ducktown mine was the result, Mr. Latimer's land, worth almost nothing before the test, now made him a rich man. He got \$50,000 for it.

The Dalton contract is based on the assumption that a new Ducktown was found. On that assumption \$300,000 is low for the land, and \$75,000 in stock is a fair substitute for the \$50,000. If the stock is not worth the money, it is not a Ducktown. Just as much as it falls below Ducktown, \$50,000 is too much for Mr. Latimer's interest. He does not get \$50,000 for his land in cash, which he was to get if it proved a Ducktown; but he does get \$75,000 in stock, which is worth \$75,000 if it is a Ducktown. By the very terms of his contract with Love he was to sell his land at a price to be proportioned according to its approach to Ducktown. He and they at Dalton, evidently believed that they had got a Ducktown, since it was understood that he was entitled to \$50,000. If he sold at all, *some* comparison with Ducktown was to be made. They all agreed it was equal, and fixed \$50,000 as the price. If they were right his stock is worth more than \$50,000. If they were not, then \$50,000 is too much. In other words, the Love contract is itself dependent on the value of the land, and the Dalton contract does nothing but keep up the same idea. Mr. Latimer, instead of \$50,000 in cash, was willing to take \$75,000 in stock in a company which had a mine equal to Ducktown. If this be so, he is not hurt. If it be not so, and the land be worthless, Love and his associates have lost more than he has. As a matter of course, in saying so decidedly that this was a fair contract, we only give our opinion and the reasons for it. We do not intend to dictate to a jury who may think otherwise. We express this opinion because the effect of the refusal of the judge to charge as requested, was, in effect, the

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expression of a different opinion. To conclude then, upon this point, my brother Trippe and I think a jury might well consider that this Dalton trade was not only founded on a valuable consideration, but was, in fact, only putting into another form the Love contract, which nobody pretends was anything but fair and reasonable. We think, therefore, the court erred in refusing to charge: "That it was a matter of course for equity to decree specific performance of a contract for the sale of land if it was in writing and was fair and for an adequate consideration;" since there was evidence to justify and require it. For this reason we think there ought to be a new trial. We do not think the jury could, under the evidence, have given much weight to the evidence of imposition or fraud in the execution of the Dalton contract. It is not a very reasonable story, to say the least of it. It is contradicted by everybody else, and it is utterly inconsistent with the frequent acts of Latimer in subsequent ratification and approval of it. As to the variance between the corporation as actually got and that agreed upon, that is a small matter—more a matter of form than substance—and we can not suppose the verdict was based upon that. Mr. Latimer seems always to have been perfectly willing to take his \$50,000 in stock, provided, only, the stock was worth what it would be if they had in fact found a Ducktown; and had they found a purchaser, even at a less rate than \$300,000, it is quite plain he would have been satisfied with his \$75,000 in stock.

Judgment reversed.

TRIPPE, J., concurred; WARNER, C. J., dissented.

LAWRENCE ET AL. V. ROBINSON ET AL.

(4 Colorado, 567. Supreme Court, 1879.)

¹ **Nature of prospecting contract.** An agreement to engage in the business of prospecting for and the development of lode mining property, for the joint use of all, is in the nature of a partnership agreement, and under such an agreement each party thereto becomes the agent of the other.

¹ *Harris v. Hillegass*, 54 Cal. 463.

²**Determinable at pleasure.** Where no time of duration is limited by such agreement, it is determinable, under equitable restrictions, at pleasure; but such determination can not operate to defeat rights accrued under it while it was in force.

Form of complaint by outfitter against prospector, set forth at length in statement.

Appeal from District Court of Custer County.

Lawrence and Hilburn, the appellants, commenced an action against Robinson and others, the appellees, in the District Court of Custer County. The complaint was as follows:

That on or about the 1st day of July, 1878, the said plaintiffs and the said William J. Robinson and Mathew J. Junkin were citizens of the United States, residing in said county of Custer, State of Colorado. That on said day these plaintiffs and the said defendants, Robinson and Mathew J. Junkin, made and entered into a contract in and by which it was then and there mutually agreed by and between them, the said parties plaintiff and defendant last named, that they would each and all engage in the business of prospecting for and development of lode mining property in Hardscrabble mining district, Colorado. That each and all of the said parties should give his time and attention to said business, and should furnish his work and labor for the purposes of said business. That each of them should furnish equal shares and proportions of all moneys and materials and labor necessary for the purposes of said business of discovery and development, and that each of the said parties should also furnish his proportionate share of the tools and implements necessary and proper for the said work. That any and all mining property discovered or developed by them, or by any one or more of them, should be held by them, and each of them, and all of them, as tenants in common, each having and holding an undivided one fourth interest. That any mining property so struck, discovered or developed in said district, when developed by them, or either of them, sufficiently to be recorded, should be recorded in the names of all the said parties to said agreement, and for their mutual use and benefit as aforesaid. And that

²*Crawshaw v. Maule*, 11 M. R. 223.

all mining property discovered, developed, located or recorded by them, or either of them, in said district, should be the property in common of the said parties thereto, and should be held by them as the sole and only owners thereof.

That under and in pursuance of said agreement, the said parties thereto did, after the said 1st day of July, 1878, enter upon the said business of prospecting for and discovery and development of mining property in the said Hardscrabble mining district, and that in pursuance of such business they did discover and develop, and cause to be surveyed and recorded in the records of Custer county, certain lode mining property hereinafter described. That the said plaintiffs also, in pursuance of said contract, gave their time and attention to the said business, and bestowed thereon their work and labor, and also furnished their proportionate share of all money, materials, tools, and provisions necessary for carrying on the said business, as well for discovery and development as for the location and record of said property, and have from said 1st day of July, 1878, up to the present time of filing this complaint, been at all times anxious and ready and willing to carry out and abide by such contract in all respects, and to discover and develop mining property, and cause the same to be located and recorded for the joint use and benefit of all of the parties to said contract.

That in pursuance of such agreement, and in carrying on the said business, the said plaintiffs and the said defendants, Robinson and Mathew J. Junkin, did on the 1st day of July, A. D. 1878, locate in said mining district a lode known and called the Victor ledge or lode; and on the 2d day of July they also located and since caused to be recorded a lode or ledge in said mining district, known and called the Calumet lode or ledge; which said locations were made in the name of all the said parties, and in pursuance of the agreement above set forth.

That on the 16th day of August, A. D. 1878, one of said parties, to wit: John W. Lawrence, having made a discovery and commenced to work therein, located two mining claims in said mining district, by setting up a stake with his name written thereon, which said claims are not yet located in form, but are still claimed by the said Lawrence; and that said claims were

prospected for and found by him while he was at work under the said agreement; and that he holds the same for the sole use and benefit of all of said parties to said agreement; and that he is ready and willing and always intended to cause the same to be fully and completely located and recorded in the names of all the parties to the said agreement, and for their sole use and benefit, in accordance with the tenor and effect of said agreement.

That on the 19th day of August, A. D. 1878, the said Edward A. Hilburn discovered a lode in said Hardscrabble mining district, and erected thereon a discovery stake, with the names of all the parties to said agreement thereon, and the name of the lode, to wit: the Spar lode, or ledge, and the date of discovery thereon. That said lode, ledge, or deposit, was prospected for, discovered and staked under and in pursuance of the said agreement above set forth, and for the use and benefit thereto, as shown by the certificate of location on record.

That on the 19th day of August, A. D. 1878, the said William J. Robinson discovered a lode in said district, and erected thereon a discovery stake, with the names of the said parties to said agreement thereon, and the name of the lode, to wit: the No. Five lode. That on the 21st day of August, A. D. 1878, these plaintiffs also discovered another lode in said district, and erected thereon a discovery stake with the names of all the said parties to said agreement, and the name of the lode, to wit: the Whetstone lode, and the date of the discovery written thereon. That said lodes were prospected for, discovered, located and recorded under and in pursuance of the said agreement above set forth, and for the use and benefit of the said parties thereto, as shown by the certificate of location on record. That on the 30th day of August, A. D. 1878, the said defendant, William J. Robinson, discovered a lode and erected a discovery stake thereon, which stake had the names of all the parties to said agreement, the name of the lode, to wit: the Iron Mine lode, and date of discovery written thereon, which said discovery and staking was also done for the use and benefit of the said parties to said agreement, and in pursuance thereof. That on the 30th day of August, A. D.

1878, the plaintiff, Edwin A. Hilburn, discovered a lode in said district and erected a discovery stake thereon, with names of the said parties to said agreement, and the name of the lode thereon, to wit: the No. Nine lode, and the date of discovery written thereon. That afterward, to wit: on the 16th day of October, A. D. 1878, the certificate of location of said lode was duly recorded in the names of the parties to said agreement above mentioned, and in pursuance thereof, as shown by said certificate of location on record in the office of the county clerk and recorder for Custer county, Colorado.

That while said agreement was in force, and on the 2d day of September, A. D. 1878, the said defendants, William J. Robinson and Mathew J. Junkin, discovered and located a certain lode, ledge or deposit, in said mining district, called the Plata Verde lode, and caused the certificate of location thereof to be recorded in the office of the recorder of deeds of Custer county on the 11th day of September, 1878; which certificate is in words and figures following, to wit:

(Here follows location certificate of the Plata Verde lode in names of William J. Robinson and Mathew J. Junkin as equal half owners.)

That the greater part of the ground now covered by the said Plata Verde lode had before that time been partially appropriated and designated as the property of the said Hilburn, Lawrence, Robinson and Mathew J. Junkin, by all the said last-mentioned parties, who, on the 11th day of July, 1878, discovered mineral therein, and thereupon erected a stake at the point where such discovery was made, with the following inscription thereon:

• July 11th, 1878.

THE CLIFF LODGE OR DEPOSIT.

We, the undersigned, claim 1,500 feet of this claim, (1,480 feet) fourteen hundred and eighty feet north of west, and (20) twenty feet south of east, Hardscrabble mining district, Custer county.

E. A. HILBURN, W. J. PALMER,
J. W. LAWRENCE, M. J. JUNKIN."

That such digging and staking were done for the use and benefit of the said parties on said stake named, by virtue of

the agreement above mentioned, and the said stake was erected to give notice of the rights of the parties; and the said plaintiffs had always intended to go on and complete the development of the said property, and procure the same to be properly recorded. But the said defendants herein afterward, to wit: on the 2d day of September, 1878, by changing the apparent direction of the said lode or ledge, and by changing discovery at another place, have located nearly the entire claim that was intended to be covered by the said Cliff lode, and are now claiming the same; and plaintiffs aver that the location of the Plata Verde is on the same lode, ledge, or deposit, and principally on the same ground covered by the said Cliff lode.

That while said agreement was in force, and on the 6th day of September, 1878, said Robinson and Mathew J. Junkin discovered, developed and located, in the names of all the parties to the said agreement, and for their use and benefit, a claim known and called the Mino Rico lode, ledge or deposit, and caused the same to be recorded in the office of the recorder of deeds of said Custer county, which certificate of location was in words and figures following, to wit:

(Here follows location certificate of the Mino Rico lode in name of William J. Robinson, Mathew J. Junkin, John W. Lawrence, Edward A. Hilburn and Frank W. Junkin as equal fifth owners.)

These plaintiffs aver that the said Frank W. Junkin had not, at the time of the making of the said record, any right to any share whatever in said claim, to the knowledge of these plaintiffs, and that if he has any right to share in any part or portion of said Mino Rico lode, it exists only by virtue of some agreement made with the said defendants, or one of them, and not with either of these plaintiffs, nor was any contract made with their consent; and that the said apportionment of one fifth to each of said parties named therein, as set forth in said certificate, is erroneous, and was not made with knowledge of plaintiffs or by their consent. These plaintiffs further aver that all the said above-mentioned lodes are located upon the public lands of the mineral region belonging to the United States, at the time of location unoccupied. That ever since the recording of said Plata Verde lode, the said Robinson and Mathew J. Junkin, as these plaintiffs

are informed and believe, have claimed, and are now claiming, that these plaintiffs are not entitled to any interest in or to any part or portion of the said Plata Verde lode, and deny that the plaintiffs have any interest therein by virtue of said agreement, or by virtue of the location of the said lode, or by virtue of the staking of said Cliff lode above mentioned. That on the 22d day of October, 1878, at said Custer county, these plaintiffs presented to said Robinson and Mathew J. Junkin deeds of quit claim of the interest as it appears of record, to an undivided two fourths of said Plata Verde lode which said deeds were from the said Robinson and Mathew J. Junkin to these plaintiffs, and requested the parties last mentioned to sign the same; and that at the same time they also presented and offered to deliver to the said Robinson and Mathew J. Junkin, deeds of quit claim, executed by these plaintiffs to the said Robinson and Mathew J. Junkin, of an undivided two fourths of all lodes discovered, developed, located or recorded by them or either of them in said Hard-scrabble mining district, since the 1st day of July, 1878; and that on the 22d day of October, 1878, these plaintiffs also demanded a deed from the said Robinson and Mathew J. Junkin and Frank W. Junkin.

These plaintiffs further allege that they are informed and believe that the said defendants are each claiming one fifth interest in said Mino Rico lode, when in truth and fact they are entitled to but two fourths of the lode; and the said Frank W. Junkin has conspired with the said Robinson and Mathew J. Junkin to cheat and defraud these plaintiffs of one tenth of said Mino Rico lode.

That said Plata Verde and the said Mino Rico lodes are of great value for the silver mineral they contain. That the said defendants, Robinson and Matthew J. Junkin, are in possession of the said lodes, and are taking out of the said Plata Verde lode large quantities of rich and valuable silver-bearing ore of great value. That they, the said defendants last named, not only deny plaintiffs' rights, title and interest to said lodes, but also to their interest in and to the ore mined therefrom, and are now threatening to sell said ore, and the said Plata Verde lode, and that the plaintiffs believe they will sell the said lode, and ore mined and taken from the same, unless

prevented by an order of this court. The plaintiffs therefore pray that they may have judgment herein against the said defendants. That the said lode mining property above described, as discovered, developed, located or recorded by the plaintiffs and the said Robinson and Matthew J. Junkin, or either of them, in Hardscrabble mining district, Custer county, Colorado, since the 1st day of July, 1878, shall be adjudged to be the property of the said Hilburn, Robinson, Lawrence and Mathew J. Junkin, as tenants in common, the same as though the said lode property had been located and recorded in the names of all the said last mentioned parties, and in accordance with the terms of the said contract. That the said Hilburn Robinson, Lawrence and Mathew J. Junkin be adjudged and decreed to make, execute, and deliver, each to the other, such deed or deeds as may be necessary to convey to each other such undivided interest in any and all mining property, developed and discovered, located or recorded, in said Hardscrabble mining district, by any one or more of them, and not located and recorded in the names of all, as by virtue of said agreement they are entitled to hold. That the said defendants may also be decreed and adjudged to convey to the said plaintiffs herein a sufficient interest in the said Mino Rico lode, to make the interest of the said plaintiffs an undivided two fourths, in accordance with their rights under said contract. That an accounting may be taken of the value of all ores taken out of said Plata Verde lode, or any other of said lodes above mentioned, and sold or converted to the use of the defendants, by said defendants, or either of them, and also an account of moneys paid out or expended by said parties to said agreement, since the 1st day of July, 1878, in and about the said business of prospecting for development and recording of lodes. And that the said parties may be decreed to pay each to the other such sums as shall be found due to the other, for or on account of moneys paid, or for moneys received for sale of ore, or otherwise mined or taken from any lode property found to be the property of the said parties. That the said defendants be enjoined from carrying away or disposing of any ore mined or taken out of said lodes above mentioned, or from selling, bonding, or in anywise disposing of or incumbering more than two fourths of said lodes, until the further order of court; and

that to secure this end a temporary injunction may issue therefor out of this court. That some proper person may be appointed by this court as a receiver, to take charge of any and all ore that may now be mined in said lode, or that has been taken out of said lodes above mentioned, with power to dispose of the same for the use and benefit of all the parties to the said agreement above mentioned, and that the plaintiffs have judgment against said defendants for their costs expended herein, and such other and further relief as may herein be meet and proper.

To this complaint a demurrer was interposed, the demurrer was sustained and the plaintiffs appealed.

W. H. OFFENBACHER and H. M. & W. TELLER, for appellants.

WELLS, SMITH & MACON, for appellees.

ELBERT J.

The bill alleges an agreement between the complainants and two of the defendants to "engage in the business of prospecting for and development of lode mining property," for the joint use and benefit of all. Such an agreement is like a partnership, and each party thereto becomes the agent of the other in prosecuting the joint adventure: *Murley v. Ennis*, 2 Col. 300.

The allegations of the bill do not support the view taken by the court below. The bill does not seek to enforce an agreement to enter into a partnership, but rights under an agreement in the nature of a partnership entered upon and acted under by the parties. On the facts alleged, which the demurrer admits, the complainants were entitled, if not to all the relief prayed, to at least a specific performance as well as an account of profits wrongfully appropriated. That no time was limited by the agreement during which it should continue in force, left it, under equitable restrictions (1 Story's Eq. Jur., § 668), determinable at pleasure, but could not operate to defeat rights accrued in virtue of its covenants while it was in force. That the property touching which relief is sought

was acquired under the agreement, and while it was in force, is sufficiently alleged. The court erred in sustaining the demurrer and dismissing the bill.

The decree of the court below is reversed, and the cause remanded for further proceedings.

Reversed.

JOHNSTONE ET AL. V. ROBINSON ET AL.

(3 McCrary 42. U. S. Circuit Court, District of Colorado, 1881.)

"Grub Stake" contract—Arrangement must continue to time of discovery. The partnership association, or association between parties who may be engaged in prosecuting explorations on the public lands for mines, must exist at the time of the location and discovery in order to give the parties, other than the discoverer, an interest in the property.

Same prospector contracting with third party. A made an agreement with B, by which the latter was to take care of the former for the winter, and furnish outfit in the spring, when A should go prospecting on their joint account. B, at least partially, complied with the agreement, by keeping A for the winter and furnishing some money in the spring. But before making any search for mines under this arrangement, A made a new arrangement with R, by which the latter furnished the "outfit," and the former did the prospecting; under this last arrangement the mines were discovered: *Held*, that the making of the arrangement with R was an abandonment of the agreement with B, and that the latter could not share in the interest of A in the property discovered and located under the new arrangement.

WELLS, SMITH & MACON, solicitors for plaintiffs.

G. G. SYMES, for defendants.

Charles Jones had made an agreement with one Johnstone to prospect for lodes. Afterward and before he began any explorations Jones made a similar contract with other parties, under which latter arrangement he discovered a lode in Ten Mile mining district, Summit county, Colorado, and received a

certain interest in the same as his share of the prospecting arrangement. Upon hearing, on bill filed by the heirs of the party with whom the first contract was made, to secure the interest which Jones retained in the discoveries made during the time when he, under his first contract, ought to have been engaged in prospecting for Johnstone, the following oral opinion was delivered by

HALLETT, J.

Sarah E. Johnstone, a married woman, and Mary A. and Ellen W., her infant children, filed a bill in the District Court of Arapahoe County against the unknown heirs of Charles Jones, to compel the conveyance of certain interests in mining property in the county of Summit. Afterward, George B. Robinson and the Robinson Consolidated Mining Company, who had acquired Jones' interest in the property, were made parties to the suit. On the death of Robinson, his heirs and perhaps his personal representatives were substituted for him as defendants, and the bill is now pending against those parties.

The theory of the case, as advanced in the bill, is that Mr. Jones, having been engaged with Mrs. Johnstone's husband in the San Juan country, in the year 1877, in prospecting for mines, agreed with Mrs. Johnstone that if he should be brought out to Denver by her or her husband, and kept here during the ensuing winter, and furnished with an outfit for prospecting in the spring, that he would give to her and her children one half of the property which he should acquire during the summer, or that they should be interested with him in some partnership relation to the extent of one half of what he should acquire during the summer.

It is alleged in the amended bill that all these things were done; that is to say, that Jones was brought to Denver and kept during the winter and furnished with the necessary outfit in the spring, and in the course of the summer that he acquired the property in which the plaintiffs claim to have an interest, and which they wish to have decreed to them in this suit.

There is some evidence to show that Jones was brought to Denver, pursuant to the agreement, and kept here during the winter by Mr. Johnstone. It may be assumed that the fact is

proved, and as to furnishing him with an outfit in the spring, there is testimony that some money was given to him at the time when he was about to start to Leadville, the amount of which is not shown; also some blankets and perhaps some clothing. It is not claimed that anything more was furnished him—provisions, or tools, or animals, if any were necessary. As to that matter, then, it may be said that the proof is not full, does not establish a compliance by the plaintiff, Mrs. Johnstone, or her husband, with the agreement.

Jones went on to Leadville, and there, after something of a spree, and idling around for some time, and making similar arrangements as to prospecting with at least two other parties, he went out in the interest of Mr. Robinson, or parties who were associated with Robinson, he himself being one of them, in an effort to discover mines. The mines in controversy here were discovered some time during the summer, Jones having in the discovery, by the terms of the agreement with Robinson and others, an interest of one fourth, or something like that, in the locations so made.

It is to secure one half of that interest so acquired by Jones under an agreement with these other parties, not with the plaintiffs in this suit or any of them, but with other parties, that this suit is prosecuted. Jones died in the autumn of that year, and the bill was brought against his unknown heirs, these other parties becoming defendants afterward.

Upon this statement of facts, I deem it only necessary to say that, in my view, the partnership relation—or if it be not called a partnership relation, but by some other name—the association between parties who may be engaged in prosecuting explorations in the public lands for mines, must exist at the time of the alleged discovery and location in order to give to the parties associated an interest in the property. If it does not then exist, so that the person acting in the field, making the discovery and the location, can be said to be acting for the others as well as himself, no interest can be acquired by those who are not personally present. Complainants' counsel seem to have felt the force of that rule, and they sought to establish the existence of this relation by Jones' admissions made by him at different times through the year, to the effect that he expected to give some interest to Mrs. Johnstone and her

children, or that they held some interest as discoverers. But that I think is not sufficient. Conceding that such admissions may have been made, and I think the evidence establishes that they were made, that is not sufficient to overcome the strong circumstances of the case. Mr. Jones had agreed with other parties, whose names I do not now recall, to go upon a prospecting expedition for them, or to allow them to stand in interest with him. He was a man of dissipation, and, as shown by the evidence here, in the habit of drinking about all the time when he could find anything to drink that would produce drunkenness, and for that reason I should say that not very much importance is to be attached to his statements.

But if we should give the greatest weight to them, the weight that would be attached to the declarations of a sober man, of deliberate ways and habits of mind, I doubt whether it could be said that one having made one arrangement or agreement with certain parties to act with them in securing mines, and afterward making another agreement with other parties, and going apparently in pursuance of the last agreement, with the means furnished by his latest associates, could be said to be acting under and in pursuance to the first agreement. I do not believe that inference would be a fair one. If several persons associate themselves together by agreement to go out and discover mines, and some of them furnish the means of prosecuting the enterprise, as provisions and tools, and the like, and others go out and contribute their labor, and each party performs his part of the agreement according to its terms, it is clear enough from the conduct of the parties as well as their declarations, that they are acting in fulfillment of their contract and agreement, whatever it may be; but when this agreement is apparently abandoned, and some new arrangement is made between new parties, and means are furnished by some of them, as arranged in the first instance, and others go out in the prosecution of the joint enterprise, any one would say upon that circumstance alone that they are acting under and in pursuance to the last agreement, and not the first. And that is the situation of affairs here. I do not think that it is open to discussion, even, that Mr. Jones, at the time he made these discoveries, was acting under his arrangement with Mrs. Johnstone. He had abandoned that, as he abandoned everything else, apparently,

within a day or two after it was made, and taken up with this new idea, with the people who came to him last and furnished the necessary articles for prosecuting his enterprise. His acquisitions during this time, as he got only a small interest in the property, must be taken to have been made for himself, and these plaintiffs were not interested in them at all; and whatever remedy they would have against him or his representatives for his breach of contract, they would have no right whatever to the property which he might acquire when acting under this new arrangement—this new agreement with Robinson and his associates.

That is the strong reason in my mind which will enforce a decree for the defendants in this case.

The bill will be dismissed, and the defendants will recover their costs.

SEARS V. COLLINS.

(5 Colorado, 492. Supreme Court, 1881.)

¹**Prospecting contracts specifically enforced.** Plaintiff showed float which he had found to defendant and defendant commenced to prospect for the lode upon joint account, and when he had found it he recorded it in his own name. Upon findings by the jury to this effect, decree for conveyance was affirmed.

Proceeds applied, treated as payments. Where a party entitled to but a half interest in the mine puts back into the mine the entire proceeds, it is the equivalent of his partner paying his half of the expenses.

²**Amendment after verdict.** It is no abuse of discretion for the court to refuse to allow an amendment to the answer after facts had been submitted to and the findings made by the jury.

Appeal from District Court of Gilpin County.

The case is stated in the opinion.

CLINTON REED and L. C. ROCKWELL, for appellant.

¹ *North Georgia Co. v. Latimer*, 12 M. R. 367.

² *Hoyt v. Smith*, 12 M. R. 321.

THOS. M. PATTERSON, HARLEY B. MORSE, and HARPER M. ORAHOOD, for appellee.

STONE, J.

Action was brought in the district court by Collins, the appellee, against Sears, the appellant, to compel a conveyance of the undivided one half of a mining claim called the Rough and Ready lode.

The complaint alleges that in the summer of 1878 complainant Collins was prospecting for mines near a place called Missouri Falls, Gilpin county, and that on the 13th day of July he communicated to Sears, his brother-in-law, the fact that he had found some rich float or surface ore, and that the parties then entered into an agreement for the purpose of prospecting for and locating mines; that in consideration of the information given by Collins to Sears concerning the place where the fragments of ore had been found, Sears agreed to go there and prospect and search for lodes, and that any and all such as he might find he would locate in the joint names of the two parties, each owning an undivided half, and that Collins was to pay one half of the expenses of such location and work in prospecting and developing the find. That under this agreement they went to the place the next day, July 14th, commenced work—and that on the next succeeding day, July 15th, while the agreement was in force, Sears discovered the lode in controversy near where Collins had found the float ore, and pointed out as the place to prospect for mines. That Sears sunk a discovery shaft on the lode, and thereupon afterward located and had recorded all of said lode in his own name, with intent to defraud Collins out of the share to which he was entitled under the agreement. That the mine had proved to be valuable, and that Sears had taken out and appropriated to his sole use a large amount of ore of the value of \$1,000. That complainant Collins had performed the agreement on his part, and had always been ready to pay the one half of the expenses, but had not paid the same, for the reason that Sears had never made demand therefor, nor informed complainant of the amount of such cost and expense, or that there was any which he was required to pay. The answer admits that Collins

showed appellant Sears some rich float ore or blossom rock, which he stated came from the spot referred to; that on the said 14th of July the parties went to the place together, but found no more float ore in the vicinity; that appellant discovered the Rough and Ready lode; that it proved to be valuable; that he had taken out about \$400 from it, and avers that the cost and expense had equaled the amount of money extracted; denies that he ever prospected for or discovered any lode for the joint benefit of Collins and himself; denies that any work was done under any agreement with Sears; and denies that any agreement was ever made for their joint benefit, as alleged; admits that he recorded the lode in his own name, and thereby acquired title for himself, but denies that Collins is entitled to any interest therein.

At the trial, certain questions of fact put in issue by the pleadings were submitted to a jury under instructions of the court, and upon these questions the jury returned as their findings:

First. That on or about July 11, 1878, Collins discovered, near Missouri Falls, some rich float ore as alleged.

Second. That on or about July 13, 1878, Collins and Sears entered into a contract to prospect for and locate mining lodes near Missouri Falls.

Third. That under said agreement, in consideration of the knowledge imparted by Collins to Sears of the place where the surface ore was found, Sears was to prospect for and locate such mines of value as he should find near the said Missouri Falls.

Fourth. That all the lodes discovered by Sears at and near said place, were, by the terms of the agreement between them, to be located in the names of both parties and to be owned by them jointly.

Fifth. That the Rough and Ready lode was discovered by Sears near Missouri Falls during the existence of this contract, and that by the terms thereof the property was to belong to Collins and Sears jointly.

Upon the return of these special findings by the jury, the court made and entered its decree that Sears convey to Collins the undivided one half of said Rough and Ready lode or mining claim, and that possession be given, etc., as prayed for.

Against this decree the principal objection made by the ap-

pellant is, that it was not established that appellee had complied with his part of the agreement respecting the payment of one half of the expenses of discovering and locating the mine; and it is assigned for error, that after the verdict of the jury or return of the findings as above stated, the court refused to allow appellant to amend his answer touching the amount of money expended by him in developing the Rough and Ready lode, *and other lodes*, in prospecting for lodes during the time in which it was alleged he was prospecting for himself and appellant.

We can see no good ground for this objection. There was no issue made upon this point, and no testimony was offered respecting it upon either side. The appellant sets up in his answer that the expenses equaled the total amount produced from the mine. Under the findings of the jury, one half this amount produced belonged to appellee, and since it was appropriated by appellant it was properly to be regarded as an application of the joint funds to such purpose, and a payment as such by appellee of his share of the expenses, and in discharge of his obligation under the agreement in this respect. There was therefore no necessity for an accounting upon this point, as was asked for and refused, since the testimony relating to it would presumably have been confined to that of the appellant himself, who alone, it is fair to presume, had knowledge of the matter of such expenses incurred by him, and who, it is further to be presumed, had truly disclosed this knowledge in his answer. It would have been a very questionable exercise of discretion on the part of the court to permit a defendant, after all the testimony had been heard upon the questions submitted, to amend his answer where it already covered this point. Such a practice would present too great a temptation for the defendant to change an averment in his plea—not to make it conform to the testimony already given, but to lay out new ground for testimony he would afterward seek to give, after the findings had been rendered upon all the issues material to a recovery by the plaintiff. The court did not err in refusing to tolerate such an abuse of the rules of practice. The errors assigned upon the giving and refusing instructions by the court are not discussed or noticed by appellant in his brief and argument, and will not be noticed here, further than to say that we fail to perceive error in this particular. Upon the testi-

mony presented by the record, we regard the decree as properly and correctly made and entered, and it will be affirmed accordingly. *Decree affirmed.*

Mr. Justice BECK, having presided on the trial below, did not participate in this decision.

1. Sufficient search, under bond to sink for coal: *Hanson v. Boothman*, 2 M. R. 217.

2. Relation between the parties created by the contract: *Henderson v. Allen*, 6 M. R. 227.

3. Contract to pay for coal thereafter to be mined can not be enforced if the land contains no minable coal: *Cook v. Andrews*, 3 M. R. 171.

4. Right, by custom of miners, to enter on land of another and search for ore: *Wake v. Hall*, 6 M. R. 119.

5. Parties obtaining title to valuable mine through information obtained by the discoverer under an agreement to compensate him, are liable for the compensation usual in such cases: *McDonald v. Upper Canada M. Co.*, 15 Grant's Ch. 179 and 551.

6. Contract to bore for oil and receive an interest if found, construed: *Dark v. Johnston*, 9 M. R. 203.

7. Prospector engaging to go with a company and share his earnings with his outfitter, not bound to labor after company dissolved: *Goodell v. Smith*, 9 Cush. 592.

8. Prospecting contract not within the Statute of Frauds: *Hirbour v. Reeding*, 11 M. R. 514.

9. Prospecting contract construed to constitute a partnership relation: *Harris v. Hillegass*, 54 Cal. 463.

10. Specific performance of, will not be decreed: *Sturgis v. Galindo*, 59 Cal. 28; 43 Am. R. 239.

11. Discoverer of oil spring may sell his knowledge and this is sufficient consideration for a promise to pay therefor: *Reed v. Golden*, 23 Kans. 632; 42 Am. R. 180.

12. Amount of labor and diligence required of the prospector; how deep required to sink shaft for coal on contract in general terms to prospect for same: *Kidmore v. Eikenberry*, 53 Iowa, 621; 6 N. W. 10.

13. A contract to pay one who had been prospecting but had quit work, an agreed sum when the company struck coal, held not to bind the company to make any efforts to find coal: *Oliphant v. Woodberg Coal Co.*, 19 N. W. 212.

14. An Indian discovered a mine, upon which the defendant company obtained a government permit to work. In consideration of his discovery, the company gave him a fractional interest in the location by written agreement. Held, that the agreement took the case out of the Statute of Frauds: *Compo v. Jackson Iron Co.*, 12 N. W. 901.

15. The prospector may hold possession of the surface while seeking for the lode: *Field v. Grey*, 1 Ariz. 404; *Crossman v. Pendery*, 4 M. R. 431.

16. No express authority is necessary to locate for an absent person; and his rights once fixed can not be divested by his agent: *Rush v. French*, 1 Ariz. 404; *Van Valkenburg v. Huff*, 9 M. R. 467.

JENNINGS V. BROUGHTON.

(5 DeGex, M. & G. 126. High Court of Chancery, 1854.)

Alleged assertions contrary to what was visible, concerning "objects of sense" which the party alleged to have been defrauded had in fact seen, are not to be considered as grounds for equitable interference.

Essentials of fraudulent representations. Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material; such as if true would add substantially to the value of the thing sold; must not be mere conjectural statements, and must be made without a belief in their truth or without grounds for such a belief.

¹ **Misrepresentations not relied on.** Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them, and had had opportunities of judging of their accuracy: *Held*, that he was not entitled by reason of them to have the contract rescinded.

No delay allowed to rescind. In suits to rescind contracts for fraud, particularly where the subject is of variable value, it is the duty of the plaintiff to put forward his complaint at the earliest period.

Appeal from a decision of the master of the rolls, reported below, in 17 Beavan, 234. The facts appear sufficiently from that report and the judgments.

WILCOCK, JAMES, and W. H. HARRISON, for the appellant.

ROUNDELL PALMER, KENYON, and GIFFARD, for the respondents.

The Lord Justice KNIGHT BRUCE.

This cause (which, produced in the principality of Wales, is not without some marks of its domicile of origin) was instituted in the year 1851, for setting aside certain sales made to the plaintiff, and obtaining accordingly a return of his purchase money, with interest; the ground of the relief prayed being certain alleged misrepresentations of fact, which he states to have been made to him by the defendants, the vendors, or under their authority and direction. The defendants, resisting the demand, put in answers not favorable to the plaintiff's case, which were replied to, and much evidence, oral and documentary, was adduced on either side. The cause thus constructed was heard at sufficient length before his honor, the master of the rolls, who, in June last, after

¹ *Holden v. Ayer*, 110 Ill. 448; *Ming v. Woolfolk*, 116 U. S. 599; *Glamorganshire Co., v. Irvine*, 6 M. & G. 565.

time taken to consider of his judgment, dismissed the bill with costs. The appeal from this decision—an appeal debated by six learned counsel during many days, not at less length nor with less minuteness before us than were bestowed on the matter at the rolls—we are now to dispose of.

It appears that in the year 1850, the defendants, having obtained a grant or lease from Lord Powis, dated the 20th of August in that year (by which the right of mining within a tract of mountain land called Craig y Mwyn, in Montgomeryshire, containing veins of lead ore, the main or sole object of pursuit and attention, was demised to the defendants for twenty-one years from the 24th of June, 1850), proceeded to the formation of a company for working under the grant, to consist of themselves and others who might be induced to take shares in the undertaking. This plan having been carried into operation, various persons, including the plaintiff, did take shares. The shares were 1,600 in the whole, but many were retained by the defendants. The plaintiff, at different times between the commencement of October, 1850, and the end of January, 1851, bought 719 shares: that is to say, 714 directly of the defendants for considerable sums of money, and five of a person who had acquired them from the defendants. These 719 shares the plaintiff alleges that he was induced to purchase by means of untrue statements of facts materially bearing upon the condition and value of the property, which he says were made to him individually and particularly, and also as one of the public, by the defendants, and under their authority, by Mr. Bell Williams, an agent of theirs—made (the plaintiff says) in part orally, but contained also (he asserts) in a report of Mr. Bell Williams, which in fact, was promulgated in August, 1850—another report of that gentleman which in fact was promulgated in October, 1850—and certain advertisements that in fact appeared in a periodical publication called “The Mining Journal” in the same October and September also of that year.

And here I may pause for the purpose of mentioning that the plaintiff is a barrister, who, called to the bar before the year 1850, was in that year between thirty and thirty-five years of age; and his letters of December, 1850, as well as other circumstances in proof, show to my apprehension plainly, that he is a person whose intelligence and capacity are

above or certainly not below mediocrity, and that throughout the years 1850 and 1851, he was (to use a familiar phrase) very well able to take care of himself. The defendants (who inhabit the frontier of England and North Wales) call themselves or are called esquires, and have, I dare say, as good a title to that designation as the majority of those who use it.

It appears that the plaintiff, in September, 1850, made one visit of inspection to the mine, and on the 1st of November following another (some of his shares having been taken after and some before that day), and, whether well informed or unlearned in geology, mineralogy or mining, it was through his own choice if he did not—but I think it a just inference from the evidence that he did—on each of those occasions, fully inspect and fully examine the mine so far as physically possible; and it must, on the evidence, as I consider, be taken that on both occasions he saw there whatever with or without the aid of lamp or candle, was an object of sight.

(After adverting to the evidence on the subject of this inspection, his lordship said:)

I am not surprised that the master of the rolls should not have been satisfied that the plaintiff, in making any one of his purchases, relied upon any information beyond that which he derived by means merely of his own inspection of the mine. And I consider it a view of his case rather favorable than unjust to him to represent and treat the validity and success or the weakness and failure of his title to a decree, as depending on these three questions:

First: in the statements or representations concerning the mine that were published or made by the defendants and Mr. Bell Williams, or by any one or more of them, or in any one of those statements or representations, was there any untrue assertion material in its nature, that is to say, which, taken as true, added substantially to the value or promise of the mine, and was not evidently conjectural merely?

In the second place: if so, was any such untrue assertion published or made without a belief in its truth by the person or persons publishing or making it?

And thirdly: if not, was the belief entertained without fair or reasonable ground?

Before proceeding, however, to the consideration of these questions, it is necessary to exclude from them, and from the

controversy altogether, every assertion, if there was any, which the visible state of the mine at the time of either of the plaintiff's two inspections of it, contradicted. The defendants, whether admitting or denying any misrepresentation, are entitled to the application and protection of the principle on which *Dyer v. Hargrave*, 10 Ves. 505, was decided by Sir W. Grant. It makes no difference in substance for the present purpose, at least in the plaintiff's favor, that *Dyer v. Hargrave* was a case of specific performance and this a rescinding bill. I desire to be understood as at once giving my opinion against the plaintiff with regard to every "object of sense" which on either visit to the mine he may, as an educated man of ordinary intelligence, having the use of his eyes, his mind on the alert and his interest awakened, be reasonably taken (whether much or little of a workman or a philosopher) to have observed; and nothing that I shall say is to be received or interpreted as extending to any such matter.

Now, supposing the first of the three questions to be answered adversely to the plaintiff I need not say that his case wholly fails; but supposing it to be answered in his favor, I conceive that, if the other two ought to be answered in favor of the defendants, the case of the plaintiff also fails altogether; and, unless various witnesses in the cause on the part of the defendants ought to be considered as perjured or very greatly in error as to matters of alleged fact, the plaintiff's case, viewed as I have just been mentioning, does fail entirely.

(After a minute examination of the evidence his lordship said:)

As to the first, then, of the three questions, I acknowledge that I entertain doubt; but it is upon the plaintiff that the burden of the proof rests. As to the second and third, however, I am satisfied that upon the materials before the court his case ought to be treated as without foundation. I must therefore hold one of two things to be right: either that the bill should stand dismissed, or that there should be an oral examination of witnesses in open court before ourselves. Between these two I have hesitated; but my opinion, ultimately formed, is that the bill should stand dismissed—not because of the great (I had almost said, considering the nature, while not forgetting the domicile of this cause, the prodigious) amount of the time of the court of chancery that at the

rolls and here has been consumed by the present litigation, but because the plaintiff, if his alleged case or any substantial part of it is well founded in merits, can obtain redress by an action, in which he may recover just damages; and because the controversy is such in local origin, is such in kind, is dependent mainly on the credit of such witnesses, and is so likely to be usefully assisted by a special jury (if not of Montgomeryshire) of Shropshire, by a view, and by the experience of a judge accustomed to circuit business, that, supposing the dispute one that ought not here and now to end, an action seems to me the course by which justice may most probably be attained by the plaintiff, if he has not already attained it.

I think that the order dismissing the bill with costs must be affirmed; but I have no objection to add a declaration, not, I believe, asked at the rolls, that the dismissal is without prejudice to an action. With regard to the costs of the appeal, I think that the defendants should only take the deposit.

The Lord Justice TURNER.—This bill is filed for the purpose of rescinding two several purchases made by the plaintiff from the defendants of 250 and 464 shares in a mining company, formed for working some mines or supposed mines in a tract of land called *Craig y Mwyn* and of having the purchase money for the shares and several sums of money paid for calls upon them, refunded by the defendants to the plaintiff.

The tract of land called *Craig y Mwyn* is of large extent, and is situate in a mineral district. It appears to have been worked by different persons at different times for many years anterior to the year 1843. In the month of April, 1843, the defendant Bibby, who was a general shopkeeper in the neighborhood, obtained a license to work it, and he associated with him in the undertaking the defendant, Robert Broughton, who was a surgeon. The defendant, R. N. Broughton, who is a wool stapler, afterward joined in the undertaking in the year 1845. The license originally granted to the defendant Bibby was for a year only, but it was renewed annually, up to the year 1850, when a lease dated the 20th of August, 1850, was granted to all the defendants for a term of twenty-one years, at a royalty of one tenth, with the usual powers and subject to the usual covenants contained in mining leases. Upon the lease being granted the defendants determined to form a company for carrying on the works, dividing

the concern into 1,600 shares, on which they ultimately fixed the price of £8 per share. The company was formed on the 12th of October, 1850, on which day the plaintiff became the purchaser of the 250 shares and he afterward purchased the 464 shares early in the following month of November. Several calls have been made upon the shares, to the amount in the whole of £1 6s. per share. This bill, which was filed in October, 1851, rests upon the ground that the plaintiff was induced to purchase these shares by false and fraudulent representations made by, or by the authority of, the defendants; and the bill alleges that the plaintiff first began to suspect the fraud which had been practiced upon him, in the month of March, 1851, and that his suspicions were afterward confirmed by inquiries made in the months of April and May in that year.

The representations impeached by the bill are, for the most part, contained in the following documents: B report of Bell Williams, (a surveyor, who was employed by the defendants to inspect the mines,) dated the 10th of August, 1850; an advertisement in the Mining Journal of the 31st of August, 1850; another advertisement inserted weekly in the same journal from the 7th of September to the 5th of October, 1850; another report of Bell Williams, dated the 1st of October, 1850; and the third advertisement in the Mining Journal of the 19th of October, 1850.

To the report of the 10th of August, 1850, it was in the first place objected that it purports to be made up on a view of the mine taken by Bell Williams, whereas the evidence shows that it was, for the most part, founded upon communications made to him by the defendant Bibby; and if the report had been descriptive of the future prospects of the mine, I think there would have been some weight in this objection, for then it might perhaps have been justly said that the plaintiff was entitled to trust, and did trust, to the competency and absence of bias of the person by whom those prospects were described; but this report seems to me to be descriptive merely of things either past or present; and if, therefore, it be true in fact, I do not see how it can be material from whom the description emanated. If it be untrue in fact, it is of course open to impeachment upon that ground, without reference to the question from whom the description contained in it proceeded. It was further objected to

this report, that it speaks of things as then existing which clearly did not exist at the time; that it refers to the present time what wholly belonged to the past; and this observation was particularly applied to the description given by the report of the level No. 1. It was said that the word "yielding," in this description imported "then yielding;" but credit must be given to persons who purchased property upon the faith of written statements for something more than a mere cursory glance at the statements on the faith of which they purchase; and a very slight examination of this statement proves that it could not be intended to refer to what was then going on.

(His lordship adverted to portions of the document leading to this conclusion, and then compared its statements with various portions of the evidence; and with respect to the statements as to level No. 1, his lordship expressed his opinion that these were borne out by the evidence. His lordship then proceeded as follows:)

There is, however, a part of the description of this level which certainly is not borne out by the evidence. It is that part which describes the lode cut through and showing the body of solid ore to be resting on the vein, three feet wide, largely intermixed with lumps of ore and calamine, and continuing to maintain the same width and characteristics to the extent of the present workings, being seventeen yards further. I find no evidence to warrant this statement. That there were lumps of ore in this level is, I think, proved; but I see no proof of there having been any calamine, and no proof of the lode continuing to maintain the same width and characteristics for the seventeen yards which are mentioned. Bell Williams indeed, in his evidence, states that the driving of the seventeen yards had not laid open or exposed any part of the vein, and that his conclusion as to the lode continuing to maintain the same width and characteristics for that distance, was founded only on the fair wall which the side of the vein presented. But to say that these statements in the report were not well founded is one thing; to say that the plaintiff was deceived by those statements, or was induced by them to purchase these shares is another thing. Looking at the character which the plaintiff gives of himself, and which is given of him by his witnesses, I think it impossible to believe that he could have been at all

induced to purchase these shares by the statement of there being lumps of calamine in this level. And with respect to the lode continuing to maintain the same width and characteristics, the plaintiff was twice at the mine, once before he purchased any shares, and the second time in the interval between his two purchases; and however ignorant he may be of mining, he must at least have been capable of seeing whether the vein had or had not been laid open behind the point where the solid ore was presented to his view. If it had, he must have known what were its characteristics. If (as was the fact) it had not, he must have known that this statement could only be matter of speculation and not of certainty.

(After adverting to the part of the report relating to the level No. 2, and to the ore found upon the surface, which his lordship considered also to be abundantly proved, his lordship continued:)

I have gone thus fully through this report, because I consider it to be the keystone of the case. If these parties had contemplated fraud, I think distinct *indicia* of it would have appeared in this report. Looking at the evidence before us I do not find any such *indicia*. My examination of the report of the evidence has led me to the conclusion at which the mining engineers examined on the part of the defendant, have arrived—that this report was a *bona fide* report, and with the exception of the passage to which I have adverted, a fair report. I do not think that there was any fraudulent intention in the insertion of that passage; but whether there was or not, I am of opinion that under the circumstances of this case the plaintiff can not found any title to relief upon the ground of that statement.

The next document is the advertisement of the 31st of August, 1850. This advertisement is a mere summary of the report, and brings forward no new statement, except the statement that there are already thirty tons of ore at the surface. It appears, however, by the evidence, that this ore was then in bulk, and that the quantity of lead therefore could only be arrived at by estimate, and the plaintiff himself was afterward present, at a meeting on the 12th of October, 1850, at which the quantity of ore on the bank was discussed. The defendant Bibby desired that it should be stated at a low rather than a high estimate; and it was set down accordingly at twenty tons,

the understanding of all parties being that it was only from guess that the quantity could be spoken of. It is hardly necessary to say that this evidence wholly displaces any title in the plaintiff to relief, upon the ground of this statement.

The documents next in order are the advertisements in the Mining Journal, from the 7th of September to the 5th of October, 1850. These advertisements contain statements which, in my judgment, are not supported by the evidence, and ought not to have been made. I refer particularly to the statements as to three lead-bearing veins being then worked, and as to the fifty tons of ore on the bank. If, therefore, these documents had been the only documents, and the plaintiff had relied upon these documents alone, I am very much disposed to think he would have been entitled to the relief prayed by this bill. But how does the case really stand in this respect? The plaintiff, before he took any shares, had before him not merely these advertisements, but also Bell Williams' report (to which I have already referred) and his further report to which I shall next refer; and he states in his evidence that it was upon these reports he mainly relied. He was fully competent to judge of the difference between the statements in the reports and in these advertisements, and he relies upon the former in preference to the latter. There is also the conversation as to the ore on the bank, to which I have already adverted. Again, he himself admits in his evidence, that on both occasions when he visited the mines before he purchased any shares, and in the interval between his purchases, he went through the levels Nos. 3 and 4, where the lead-bearing veins described in these advertisements as being then worked, were intersected; and it is clear from the evidence of Edward Hampson, that he was no inattentive observer of what was going on.

These facts taken alone would, I think, be sufficient to show that the plaintiff did not rely upon the advertisements. But the case by no means rests here. On the 1st of November, 1850, we find him in conversation with Evans, who, being then about to purchase shares, asks his opinion as to the mine, and his answer is that judging from its appearance there was a strong probability of its proving a profitable mine. And again, later in the same month he visits at Mr. Evans' house, exhibits the map, and points out and explains the levels of the mine, and

being asked his opinion as to whether there was plenty of ore, replies that he has no doubt there was abundance, but that his only fear was lest the value of the lead should be depreciated. Putting together these facts and other facts which appear in the case, much as I disapprove these advertisements, I can not justify to myself the belief that the plaintiff in any manner relied or acted upon them. (After commenting on the other representations made, and the evidence as to their accuracy, and saying that his lordship did not consider the case carried further by them, his lordship said :) There are, however, one or two other points in the case to which I will shortly refer. I think it clear upon the evidence that these defendants, if they had thought proper to do so, might have sold many more shares in the mine, and sold them at a premium; and that the fact of their not having done so is strong evidence of *bona fides* on their part. I think, also, that in cases of alleged fraud, and particularly in cases of fraud affecting property of this nature, it is the duty of any one complaining of the fraud to put forward his complaint at the earliest possible period.

Now, the first sale of the lead of the company took place early in December, 1850. The quantity then sold certainly did not correspond with the prospects held out by the reports and advertisements. Yet the plaintiff made no complaint, and on the contrary, at the meeting in January, refused to sell any shares even at a considerable premium. If the relief prayed by this bill be granted, how are the defendants to be compensated for the loss which they may have sustained by not having been placed in a position to sell to other persons who might have been well content to abide the risk from which the plaintiff desires to shrink? I think, further, that it sufficiently appears that the plaintiff purchased these shares with the full knowledge that he was embarking in a speculative concern, and the intention to do so. In proof of this I may refer, amongst other evidence, to the plaintiff's letters of the first and second April, 1851. The true state of the case seems to me to be that the plaintiff was incited by the prospect of large gains, and acted too hastily perhaps, on his own judgment.

And, finally, I think, that although it is the undoubted duty of this court to relieve persons who have been deceived

by false representations, it is equally the duty of this court to be careful that in its anxiety to correct frauds it does not enable persons who have joined with others in speculations, to convert their speculations into certainties at the expense of those with whom they have joined. This, in my opinion, would be the effect of giving the plaintiff the relief which he asks, and I think, therefore, that this bill has been properly dismissed.

I have felt some doubt about the costs: but the case put forward by the plaintiff is one of fraud, and I think a very strong case ought to be made out to warrant a court of appeal in interfering with the discretion of a judge in the matter of costs. Upon the whole, I do not feel strongly enough to propose any alteration of the decree in this respect. I think the justice of the case will be met by dismissing the appeal upon the terms which have been suggested. It must be dismissed accordingly.

SMITH V. REESE RIVER COMPANY.

(L. R. 2 Eq., 264. Before the Vice-Chancellor, 1866.)

Departure from prospectus—Enjoining action for calls. A company was formed for mining purposes; the prospectus referred to the memorandum and articles, and described in favorable terms a mine for the purchase of which a contract had been entered into. This mine was afterward found to be worthless, and the directors rescinded the contract, and agreed to purchase another: *Held*, that a shareholder who had subscribed on the faith of the prospectus, was entitled to an injunction against an action for calls, although the directors had been themselves deceived, and had been guilty of no willful fraud.

This was a motion to restrain the Reese River Silver Mining Company, limited, from commencing or prosecuting any action against the plaintiff for the recovery of a call.

(For the facts of this case see *Smith's case*, 13 M. R. 19, where the opinion below is in part affirmed and in part reversed.)

Mr. ROLT, Q. C. and Mr. EDDIS, in support of the motion.

Mr. ROXBURGH and Mr. BUCHANAN, for the defendants.

Sir W. PAGE WOOD, V. C.

I entertain a strong opinion that the misrepresentations which were made in the prospectus published by the company have a material bearing upon the right of the company to retain the name of the plaintiff upon the register of shareholders.

Passing over the first statement in the prospectus as to the wealth of the State of Nevada, where the property was situate which the company had contracted for, and as to the large daily returns and the official documents, all which statements may or may not be true, I find statements as to the value of the particular property contracted for, and the large fortune amassed by the proprietor. Were the directors of the company in a position to make these statements on the faith of which persons have been invited to subscribe the articles of association?

Now all that the directors knew was that Anderson had introduced Jones to Aaris, who signed a contract which embodied the statements contained in the prospectus as to the mine. All this story in the prospectus was an absolute falsehood. Singularly enough the directors, who should have examined into the truth of the prospectus before putting it forward on behalf of the company, suddenly awake to their duties when they have caught their subscribers. They say that they considered it their duty, as directors of the company, to send out a deputation to inspect the property and inquire into its value before proceeding to work it. The deputation sent back a report which reads more like a novel than anything in real life. They say that their anticipations regarding the property belonging to Jones have been more than realized as it was found to be almost valueless, but that this was a matter for rejoicing. Why for rejoicing it is difficult to understand. It might have been so if they could thus have escaped a ruinous contract; but this was not the case, as the contract was not binding upon the company if the company declined to complete it. The directors therefore have put forward statements concerning the con-

tract entered into which were wholly untrue, and which they had no reasonable ground for believing to be true. It was urged on behalf of the defendants that this company was formed not merely to carry out this particular contract, but for the general purposes and objects stated in the memorandum of association. I admit that the plaintiff must be taken to have had full notice, and to be bound by the contents of the memorandum and articles of association; but the fact that the company had power to work other mines is not sufficient to absolve them from the misrepresentations contained in the prospectus as to this particular property. It is true that the prospectus stated that further information might be obtained at the company's offices; but this was not enough to put persons intending to apply for shares upon inquiry whether statements put forward by the directors were true or false. Looking at the character of the case, and the fact that the plaintiff has already paid £200, I do not consider that he ought to be required to pay the amount of the call into court. There will be an injunction in the terms of the notice of motion.

Solicitors for the plaintiff, Messrs. FLUX & ARGLES.

Solicitor for the defendants, Mr. GEORGE LAWRENCE.

1. Shareholder becoming such upon the faith of a false prospectus may maintain a bill to be relieved of his shares: *Smith's Case*, 13 M. R. 19.
2. Directors responsible for false prospectus: *Clarke v. Dickson*, 6 M. R. 523; *Morgan v. Skiddy*, 7 M. R. 74.
3. Defendants in their prospectus guaranteed in terms dividends to the stock buyers. Held, not liable as on a contract, but that it amounted to a fraud, and that they were liable on the count for tort: *Gerhard v. Bates*, 2 El. & Bl. 476.
4. Recklessness in prospectus treated as evidence of fraud: *Glamorgan-shire Co. v. Irvine*, 6 M. R. 565.
5. Issue of printed prospectus must be proved before it can be used in evidence: *Berry v. Mathewes*, 7 Ga. 457.
6. Circulating prospectus not sufficient to hold party charged with being director in an abandoned mining adventure: *Drouet v. Taylor*, 16 Com. B. 671.

MOORE V. SMAW AND FREMONT V. FLOWER.

(17 California, 199. Supreme Court, 1861.)

Mexican grant of land, does not include mines of gold and silver. By the law of Spain, the mines were the property of the crown, as part of the royal patrimony. The Mexican law on this subject was derived from the Spanish law, differing from it only in the particulars occasioned by the change in the form of government following the separation of Mexico from the Spanish authority. Under this law, all mines of gold and silver in the country, though found in the lands of private individuals, were the property of the nation. By the ordinary grant from the government of Mexico to an individual, only an interest in the surface or soil passed; no interest in minerals passed without express words designating them.

Royal mines—Various nations. The general policy of the British, Spanish, Mexican, and incidentally of the French governments, to their mines of the royal metals, stated.

Conveyance of royal mines in Mexico. Under Mexican law the interest in the royal minerals was conveyed under the mining ordinances by registry of discovery in case of new mines, and by denouncement in case of abandoned mines.

Cession by Mexico of Mariposa tract included mines. At the date of the cession of California, no minerals of gold or silver had been discovered in the grants under consideration in this case (the Mariposa and other tracts), and of course no proceedings had been taken by which any individual interest had been acquired from the Mexican government. Such minerals, therefore, were at that time the property of the Mexican government, and passed by the cession to the United States government.

¹Ownership of mines not a right of sovereignty. The minerals of gold and silver which passed by the cession of California to the United States, were not held in trust for the future State, nor did their ownership vest in the State of California upon its admission into the Union. The ownership of the precious metals is not one of the rights of sovereignty which the United States holds in trust for the States; nor is it essential to the sovereignty of a State that she should own the gold and silver mines within her borders.

Sovereignty and prerogative distinguished. By the common law, the right to mines of precious metals was not an incident of sovereignty, but a personal prerogative of the king, which could be alienated at pleasure; and this privilege is not one of the incidents of the sovereignty of a State.

²Patent confirming Mexican grant conveys precious metals. There is nothing in the act of March 3, 1851, which restricts the operation of patents issued in confirmation of the rights acquired by grants from Mexico; and although the interest transferred by Mexico to its grantee did not include the precious metals, yet patents issued in confirmation

¹ *Gold Hill Co. v. Ish*, 11 M. R. 635.

² *Ah He v. Crippen*, 10 M. R. 367; *Fremont v. Seals*, 11 M. R. 632.

thereof can not in any respect be distinguished from the general class of conveyances made under that designation by the United States.

United States patent conveys minerals. The patent of the United States passes to the patentee all the interest of the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed or fixed to its surface; in fact, in everything embraced within the term "land."

Patent construed as deed. The conveyance of land by an individual carries the deposits of gold and silver, unless expressly reserved, and the United States, with reference to their real property within the limits of a State, occupy only the position of a private proprietor, with the exception of exemption from State taxation; and their patent must receive the same construction, with reference to the precious metals, as the deed of an individual.

Appeal from the Thirteenth and Fifteenth Districts.

The appeal in the case of *Moore v. Smau* is from the District Court of the Fifteenth District, county of Butte. The appeal in the case of *Fremont v. Flower* is from the District Court of the Thirteenth District, county of Mariposa. The appeals in both cases were considered together, as they involve a consideration of the same question. In *Moore v. Smau*, the grant of the Mexican government was issued to Dionisio and Maximo Fernandez; but the patent of the United States was issued, upon confirmation of the claim under the grant, to them and Josiah Belden and William R. Basham, who had become with them interested in the land granted. The concluding clause of the patent is as follows:

"The United States of America, in consideration of the premises, and pursuant to the provisions of the act of Congress aforesaid, of third of March, 1851, have given and granted unto the said Dionisio Z. Fernandez, Maximo Zinon Fernandez, Josiah Belden, and William R. Basham, and to their heirs, the tract of land embraced and described in the foregoing survey; but with the stipulation that in virtue of the fifteenth section of the said act, the confirmation of this said claim and this said patent shall not affect the rights of third parties; to have and to hold the said tract, with the appurtenances, unto the said Dionisio Z. Fernandez, Maximo Zinon Fernandez, Josiah Belden, and William R. Basham, and to their heirs and assigns, with the stipulation aforesaid."

"In testimony whereof, I, James Buchanan, President of

the United States, have caused this letter to be made patent, and the seal of the General Land Office to be hereunto affixed," etc.

The plaintiff Moore alleged title in fee simple to the premises from which the gold in suit was extracted, by mesne conveyances from the patentees.

In *Fremont v. Flower*, the grant of the Mexican government was issued to Juan B. Alvarado, who sold and conveyed his interest to Fremont in 1847. The claim to the land under the grant was presented for confirmation by Fremont, and the patent of the United States was issued to him. Its concluding clause is as follows:

"That the United States of America, in consideration of the premises, and pursuant to the provisions of the Act of Congress, aforesaid, of the third of March, 1851, have given and granted, and by these presents do give and grant unto the said John C. Fremont, as alienee of Juan B. Alvarado, and to his heirs, the tract of land embraced and described in the foregoing survey; to have and to hold the said tract, with the appurtenances, unto the said John C. Fremont, as alienee of the said Juan B. Alvarado, and to his heirs and assigns forever.

"In testimony whereof, I, Franklin Pierce, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

"Given under my hand, at the city of Washington, this nineteenth day of February, in the year of our Lord one thousand eight hundred and fifty-six, and of the Independence of the United States the eightieth.

"FRANKLIN PIERCE.

[L. S.] (Seal of the U. S. General Land Office.)

"By the President:

"JOSEPH S. WILSON,

"Acting Recorder of the General Land Office, *ad interim*."

The demurrer in the case of *Moore v. Smaw* was overruled, and the defendant declining to answer, judgment final was entered for the plaintiff, from which the defendant appeals.

The case of *Fremont v. Flower* was presented to the court below upon an agreed statement of facts, relating, principally, to the grant to Alvarado, under which Fremont claimed the land subsequently patented to him, the confirmation of the

claim, the proceedings consequent thereon, and the issuance of the patent. The facts, as admitted, are sufficiently given in the opinion of the court. Upon the agreed statement the court below rendered judgment for the plaintiff, and the defendant appeals. All other material facts are stated in the opinion.

W. H. RHODES, for appellant Smaw.

FRANK TURK, for appellant Flower.

CHARLES T. BOTTS and P. A. McRAE, for respondent Moore.

HALL McALLISTER, for respondent Fremont.

FIELD, C. J. delivered the opinion of the court, COPE, J. concurring.

The records in these cases present for consideration the question whether a patent of the United States for land in California, issued upon a confirmation of a claim held under a grant of the former Mexican government, invests the patentee with the ownership of the precious metals which the land may contain. In the first case the complaint alleges that in March, 1860, the plaintiff was seized in fee and possessed of a tract of mineral land situated in Butte county, by virtue of a grant issued by Pio Pico, governor of California, to Dionisio and Maximo Fernandez, on the twelfth of June, 1846, and a patent of the United States, issued on the fourteenth of October, 1857, pursuant to the act of Congress of March 3, 1851, for the settlement of private land claims in California; and that whilst thus seized the defendant entered upon the premises, and extracted and removed from the same large quantities of gold, of the value of four hundred dollars, "which gold was a part and parcel of the said premises, and as such was and is the property" of the plaintiff; and concludes with a demand for damages to the amount of the alleged value of the gold thus extracted and removed. To the complaint the defendant demurred upon various grounds, the substance of which is, that the title of the plaintiff, as disclosed therein,

was of such a character as to vest in him only the ownership of the soil, without any interest in the minerals of gold and silver which it contained.

In the second case the complaint alleges that on the nineteenth of February, 1856, the plaintiff was seized in fee and possessed of certain premises situated in Mariposa county, and has been thus seized and possessed ever since; that the premises contain large and valuable veins and mines of gold and gold-bearing quartz; that in November, 1860, the defendant entered upon the premises and extracted from the soil thereof five pounds of gold and ten tons of gold-bearing quartz, of the value of \$2,000, then and ever since the property of the plaintiff, and removed the same and converted them to his own use; that the plaintiff has demanded of the defendant the delivery of this property, which is refused, and that the defendant still unjustly detains the same; and concludes with a demand of judgment for its possession, or for its value in case a delivery can not be had.

The answer of the defendant admits the several allegations of the complaint, except as to the ownership of the plaintiff of the gold and gold-bearing quartz; and avers, that though the plaintiff is seized in fee of the premises, "he has not now and never has had any ownership of, or property or interest in the gold or gold-bearing quartz contained in the soil thereof," and in the first count that they are "the absolute and exclusive property of the State of California," and in the second count that they are in like manner "the absolute and exclusive property of the United States."

The case was presented to the court below upon an agreed statement of facts, and appears to be an amicable suit for the purpose of determining the question whether the precious metals passed to Fremont with the land in which they are contained under the patent of the United States. The agreed statement relates principally to the grant to Alvarado, under which Fremont claimed the land in Mariposa, the confirmation of his claim, and the proceedings following such confirmation and the patent issued to him. The grant was the subject of, elaborate consideration by the Supreme Court of the United States in the case of *Fremont v. U. S.*, 17 How. 542, and in the report of the case it is set forth at length, together with

the petition upon which it was made. It is sufficient for the present case to state that the grant was issued to Alvarado in 1844 by Micheltorena, the then governor of California; that it was of a tract of land known as "Las Mariposas," to the extent of ten square leagues; that Alvarado conveyed his interest in the tract to Fremont in 1847; that the validity of the grant was determined by the Supreme Court in December, 1854, and in pursuance of the mandate of that court a final decree of confirmation was entered by the district court in June, 1855; that in July following the ten leagues were surveyed and segregated from the general tract embraced within the exterior boundaries designated in the grant, under the direction of the surveyor general of the United States for California; that the survey was subsequently approved by that officer, and that upon the survey and decree of confirmation a patent was issued by the United States on the nineteenth of February, 1856, signed by the president and countersigned by the acting recorder of the general land office at Washington, and bearing the seal of that office. The patent refers to the grant, and the proceedings taken for the confirmation of the claim of Fremont thereunder, the judgment of the Supreme Court, and the final decree of the district court, the survey in pursuance thereof and its approval, and concludes with the following granting clause: "That the United States of America, in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid, of the third of March, 1851, have given and granted, and by these presents do give and grant unto the said John C. Fremont, as alienee of Juan B. Alvarado, and to his heirs, the tract of land embraced and described in the foregoing survey; to have and to hold the said tract, with the appurtenances, unto the said John C. Fremont, as alienee of the said Juan B. Alvarado, and to his heirs and assigns forever." This patent embraces the premises described in the complaint, from which the gold and gold-bearing quartz in controversy were extracted and removed. All claim for damages for the entry upon the premises and the disturbance of the soil are expressly waived, and the claim of the plaintiff and the defense of the defendant both made to rest exclusively upon the question whether the plaintiff has a right of property in the gold and gold-bearing quartz for the recovery of which the action is brought.

At the time the grants to the Fernandez and to Alvarado were issued, it was the established doctrine of the Mexican law that all mines of gold and silver in the country, though found in the lands of private individuals, were the property of the nation. No interest in the minerals passed by a grant from the government of the land in which they were contained, without express words designating them. By the ordinary grant of land only an interest in the surface or soil, distinct from the property in the minerals, was transferred. The Mexican law on this subject was derived from the Spanish law, differing from it only in the particulars occasioned by the change in the government of Mexico following the separation of the latter country from the Spanish monarchy. Under Spain, the mines constituted the property of the crown, as part of the royal patrimony. It was so declared in various laws at an ancient period. By a law of the Partidas, which were promulgated as early as 1343, it was declared that the mines were so vested in the king that they did not pass in his grant of the land, though not excepted in terms. (Law 5, tit. 15, P. 2.) By a law of Alphonzo XI all mines of silver and gold, and of other metals, and the produce of the same, were declared to be the property of the crown, and no one was allowed to work them except by special license or grant, or unless authorized by immemorial prescription. (Rockwell's Spanish and Mexican Laws, 126.) By a law of John I this rule was modified, and a general license was granted to all persons to search for and work the mines in their own lands, and by permission of the owners in the lands of others, and to retain one third of the net produce, the balance to be rendered to the king. (Rockwell, 126.) Under this law few mines were discovered and worked, owing in part, as was supposed, to the fact that a great proportion of the mines of the country had been previously granted to noblemen and others, with bishoprics, arch-bishoprics, and provinces, with exclusive privileges. To remove the obstacles thus interposed to the discovery and development of the mineral wealth of the country, Phillip II, by a decree promulgated on the tenth of January, 1559, annulled all previous exclusive grants made by himself or his predecessors, except in those cases where the mines were at the time worked ; and resumed and incorporated

into his patrimony all the mines of gold, silver and quicksilver in his kingdom wherever found, "whether in public, municipal or vacant lands, or in inheritances, places and soils of individuals." (Halleck's Col. 6.) The object of this incorporation was not to restrict to the king the right to search for and work the mines, but to extend this right freely to all persons. Accordingly, in the second article of the decree, the king granted permission and authority to all his subjects and native citizens to search for and work mines of gold and silver in all lands of the kingdom, with certain specified exceptions, subject, however, to the payment to the crown of a certain proportion of the net produce derived from the mines discovered. From the promulgation of this decree, the ownership of the precious metals by the sovereign throughout the dominions of the Spanish monarchy was, in all subsequent legislation, fully recognized, and the policy of allowing all persons to search for, and upon discovery to work the mines, was rigidly followed. Various ordinances, prescribing the extent of the acquisitions which might be made by individuals by discovery, and the manner in which the incipient right thus obtained should be authenticated, perfected and maintained, were passed at different periods. It is unnecessary for the present case to refer particularly to their provisions. It is sufficient to state that they required a registry of the discovery before certain public officers, and that the registry when made operated as a concession of the mine to the discoverer, subject to certain conditions. They all proceeded upon the admitted right of the crown to the minerals. Those established on the twenty-second of August, 1584, and generally designated as the "New Ordinances," to distinguish them from regulations of an earlier date known as the "Old Ordinances," whilst revoking all previous laws, edicts, privileges and customs, in express terms excepted the decree of January 10, 1559, so far as it vested in the crown all mines of gold and silver and quicksilver, and annulled all grants which had been previously made. These ordinances were in force not only in Spain, but in New Spain, which included California, until the year 1783. In this latter year the king gave his approval to the code of mining ordinances framed for New Spain by the general mining tribunal formed in 1778, and ordered that all their contents

should be regarded as "law and statute, positive and perpetual," and be "inviolably observed, notwithstanding any other laws, ordinances, establishments, customs or practices to the contrary," which, so far as existing, were thereby expressly revoked. These ordinances were published by proclamation of the viceroy throughout New Spain, in January, 1784. In the first article of the fifth title they declare that the mines are the property of the royal crown, as "well by their nature and origin as by their reunion, declared in Law 4, Title 13, Book VI, of the Nueva Recopilacion." The law thus named is the decree of Phillip II, of January 10, 1559, to which we have already referred.

Upon the separation of Mexico from Spain, the mines which until that period were vested in the Spanish crown passed to and vested in the Mexican nation. Upon this subject Lares, a distinguished Mexican writer, says:

"The Mexican nation, having been declared free and independent of the Spanish government, and of every other power, the seigniorship of the King of Spain over the mines absolutely terminated, in like manner as terminated all the dominion and sovereignty which he might have exercised over the territory of the nation. What are, then, the principles recognized at present by legislation in regard to the mines?

"The legislator has not occupied himself at all in making a formal declaration upon the matter, like that which was made in France in 1791, nor upon a regulation, complete and definite, like that of 1810; but in those partial provisions which he has made upon the branch of mining, he has recognized in a manner implied, but clear and evident, the principle that the mines belong to the *nation*, declaring expressly that to it alone does it appertain to *grant* this class of property. Thus it is that in the decree of the General Congress of October 7, 1823, enabling foreigners to make with the owners of mines contracts for every kind of supplies, even to the extent of acquiring in ownership, shares in the operations which they supply, he reminds them that they have to remain subject in everything to our ordinances for the working of the mines, and to the other obligations and charges under which the *nation grants the ownership* of such parcels of ground to every citizen.

"Two principles, each most important, the legislator recognizes in this notable disposition: the first, that the ordinances of mining are in force, and by them must be regulated the working of the mines; the second, that it is the nation which grants the ownership of the mines. But how could the nation *grant* that which it *has not*?"

"And how would it be able to give to *one* that which it might have acknowledged to belong to *another*? The law, therefore, has not recognized the property of the 'mine' to be in the owner of the field, but has made it to consist in the *grant* which the nation makes to him who registers or denounces it in conformity with the ordinance.

"The same was the conception of the decree of March 11, 1842, which empowered foreigners to acquire real property. In speaking of the mines, it empowers them to acquire in ownership those of which they should be the discoverers, in conformity to the ordinance upon that branch. Here, again, is seen united the ownership with the grant, through the medium of the discovery, in the terms which the ordinance prescribes.

"There is therefore no doubt that our legislation, like the French, distinguishes the property of the soil from that of the mine; recognizes that only the nation can grant the latter property, and establishes that the grant is made in the manner which is determined in the ordinance of 1783." (Lares' *Derecho Administrativo*, 91, 93.)

The minerals thus vested under the Spanish monarchy in the crown, and after the separation of Mexico, in the nation, did not pass, as we have already stated, by the ordinary grant of land, without express words of designation. Such grant transferred only an interest in the soil distinct from that of the minerals. The interest in the minerals was conveyed, through the operation of the mining ordinances, by registry of discovery, or by proceedings upon denouncement when a mine once discovered and registered had been abandoned or forfeited.† At the date of the cession of California to the

† NOTE.—Mr. Halleck, in his introductory remarks to his translation of DeFooz' work on the "Fundamental Principles of the Law of Mines," thus defines registry of discovery and denouncement.

"1. Registry of discovery (*registro de mina nueva*). In order to acquire

United States, no minerals of gold or silver had been discovered in the land embraced by the grant to the Fernandez or by the grant to Alvarado; and of course no proceedings had been taken by which any individual interest in them was acquired from the government. They constituted, therefore, at that time, the property of the Mexican nation, and by the cession passed, with all other property of Mexico within the limits of California, to the United States.

We do not understand that this conclusion is controverted by the defendants; but two positions are advanced by them which, though inconsistent with each other, would, if sustained, be equally availing against the claims of the plaintiffs:

the ownership of a mine newly discovered, the party must present a written application to the proper authority of the district, where the mine is situate (and if there be none in that district then in the nearest one,) setting out certain particulars in regard to himself and the mine he wishes to register; whereupon notices are posted up in certain public places; the mine must be opened and worked to a certain depth within a certain specified period; and after due inspection by the proper officers, the possession is given, and the limits or extent of the *pertenencias* are fixed. These proceedings, known as the registry, constitute the concession; and, the right or title thus acquired to the mine and its appurtenances remains in the party making the registry, his heirs and assigns, forever, unless forfeited or defeated for non-user, or for non-compliance with the conditions attached by law to its continuance.

"2. Denouncement of an old mine (*denuncio de mina abandonada*). The proceedings by which the ownership of an old mine is acquired are the same as those of making registry of a mine newly discovered, except that instead of adducing proof of discovery, evidence must be given of the abandonment by the former owner, or that for some other reason the mine has become subject to denouncement (*o considera por algun otro motivo denunciabile*). The former owner, if he be known, and the occupants of the adjacent mines, must be duly notified, and public notices given in the manner prescribed. At the expiration of the proper time and on the hearing of the case the mine may be declared vacant, and the possession of it given to the denouncer, who thus becomes the next owner. There is therefore no essential difference between registry and denouncement; indeed, the new title acquired to the mine denounced results from the act of registry. Gamboa, therefore, very properly considers the two acts as virtually the same—one name being applied to a newly discovered mine, and the other to an old one. Moreover, the term denouncement is not unfrequently applied to the act of making known the discovery of a new mine; and even when used with respect to an old one, it is properly applicable only to that part of the proceedings by which the mine is alleged, proved and declared vacant, those by which the new ownership is acquired being in fact an act of new registry."

1st: that the minerals of gold and silver, which passed by the cession, were held by the United States in trust for the future State, and that upon the admission of California the ownership of them vested in her, and 2d: that the minerals remain the property of the United States, and did not pass by their patents.

The first position finds support in the decision of *Hicks v. Bell*, 3 Cal. 219, where this court held that the mines of gold and silver found in the public lands are the property of the State by virtue of her sovereignty; and assumed that similar mines in the lands of private citizens also belonged to her by the same right. That decision has not met the approbation of the profession or retained the approbation of the distinguished judge who delivered it. The question as to the ownership of the minerals was not raised by counsel, and its determination was not required for the disposition of the case. But independent of this consideration, which only goes to the force of the decision as authority, we are clear that the doctrine there advanced can not be sustained. It is undoubtedly true that the United States held certain rights of sovereignty over the territory which is now embraced within the limits of California, only in trust for the future State, and that such rights at once vested in the new State upon her admission into the Union. But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of a State, than that of any other property which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an independent State or Nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain, are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. In this country this authority is vested in the people, and is exercised through the joint action of their Federal and State governments. To the Federal government is delegated the exercise of certain rights or powers of sovereignty; and with respect to sovereignty, rights and powers are synonymous

terms; and the exercise of all other rights of sovereignty, except as expressly prohibited, is reserved to the people of the respective States, or vested by them in their local governments. When we say, therefore, that a State of the Union is sovereign, we only mean that she possesses supreme political authority, except as to those matters over which such authority is delegated to the Federal government, or prohibited to the States; in other words, that she possesses all the rights and powers essential to the existence of an independent political organization, except as they are withdrawn by the provisions of the constitution of the United States. To the existence of this political authority of the State—this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the political jurisdiction of the State. They may be acquired by the State, as any other property may be, but when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right; by the right of ownership, and not by any right of sovereignty.

In *Hicks v. Bell*, the court states correctly that, according to the common law of England, mines of gold and silver were the exclusive property of the Crown, and did not pass in a grant of the King under the general designation of lands or mines; but it assumes that this right of the Crown—this regalian right—vested in the State. "It is hardly necessary," in the language of the opinion, "at this period of our history, to make an argument to prove that the several States of the Union, in virtue of their respective sovereignties, are entitled to the *jura regalia* which pertained to the King at common law." It is in this assumption that the error of the decision consists. Under the general designation of *jura regalia* are comprehended not only those rights which pertain to the political character and authority of the King, but also those rights which are incidental to his regal dignity, and may be severed at his pleasure from the Crown and vested in his subjects. It is only to certain rights of the first class that the States, by virtue of their respective sovereignties, are entitled.

It is to the second class that the right to the mines of gold and silver belongs.

In the great case of *The Queen v. The Earl of Northumberland*, Plowden, 310, which was argued before the barons of the Exchequer and all the justices of England, it was held by their unanimous judgment: "that by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore;" and also, "that a mine royal, either of base metal containing gold or silver, or of pure gold and silver only, may, by the grant of the King, be severed from the Crown, and be granted to another, *for it is not an incident inseparable to the Crown, but may be severed from it by apt and precise words.*" This case was decided in 1568, during the reign of Queen Elizabeth, and continues unto this day an authoritative exposition of the doctrine of the common law. It is conclusive to the point that the right to the mines was not regarded by that law as an incident of sovereignty, but was regarded as a personal prerogative of the King, which could be alienated at his pleasure.

No reasons in support of the prerogative are stated in the resolution of the judges, and those advanced in argument by the Queen's counsel would be without force at the present time. Onslow, the Queen's solicitor, says Plowden, "alleged three reasons why the King shall have mines and ores of gold and silver within the realm, in whatsoever land they are found. The first was, in respect to the excellency of the thing, for of all things which the soil within this realm produces or yields, gold and silver is the most excellent, and of all persons in the realm, the King is, in the eye of the law, most excellent. And the common law, which is founded upon reason, appropriates everything to the person whom it best suits, as common and trivial things to the common people, things of more worth to persons in a higher and superior class, and things most excellent to those persons who excel all others; and because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought) to the person who is most excellent, and that is the

King. * * The second reason was, in respect of the necessity of the thing. For the King is the head of the Weal-public and the subjects are his members; and the office of the King, to which the law has appointed him, is to preserve his subjects; and their preservation consists in two things, viz. : in an army to defend them against hostilities, and in good laws. And an army can not be had and maintained without treasure, for which reason some authors, in their books, call treasure the sinews of war; and, therefore, inasmuch as God has created mines within this realm, as a natural provision of treasure for the defense of the realm, it is reasonable that he who has the government and care of the people, whom he can not defend without treasure, should have the treasure wherewith to defend them. * * The third reason was, in respect of its convenience to the subjects in the way of mutual commerce and traffic. For the subjects of the realm must, of necessity, have intercourse or dealing with one another, for no individual is furnished with all necessary commodities, but one has need of the things which another has, and they can not sell or buy together without coin. * * And if the subject should have it (the ore of gold or silver) the law would not permit him to coin it, nor put a print or value upon it, for it belongs to the King only to fix the value of coin, and to ascertain the price of the quantity, and to put the print upon it, which being done, the coin becomes current for so much as the King has limited. But if the subject should have the ore of gold and silver which is found in his land, he could not convert it into coin, nor put any print or value on it. For if he makes coin, it was high treason by the common law before the statute of 25th Ed. III, Cap. 2, as it appears by 23d Ass., where a woman was burnt for forging or counterfeiting money, and it was high treason to the King, because he has the sole power to make money. So that the body of the realm would receive no benefit or advantage if the subject should have the gold and silver found in mines in his land; but on the other hand, by appropriating it to the King, it tends to the universal benefit of all the subjects in making their King able to defend them with an army against all hostilities, and when he has put the print and value upon it, and has dispersed it among his subjects, they are thereby enabled to carry on mutual com-

merce with one another, and to buy and sell as they have occasion, and to traffic at their pleasure. Therefore, for these reasons, viz., for the excellency of the thing, and for the necessity of it, and the convenience that will accrue to the subjects, the common law, which is no other than pure and tried reason, has appropriated the ore of gold and silver to the King, in whatever land it be found."

It would be a waste of time to show that none of the reasons thus advanced in support of the right of the Crown to the mines can avail to sustain any claim of the State to them. The State takes no property by reason of "the excellency of the thing," and taxation furnishes all the requisite means for the expenses of government. The convenience of citizens in commercial transactions is undoubtedly promoted by a supply of coin, and the right of coinage appertains to sovereignty. But the exercise of this right does not require the ownership of the precious metals by the State, or by the Federal government, where this right is lodged under our system, as the experience of every day demonstrates.

The right of the Crown, whatever may be the reasons assigned for its maintenance, had in truth its origin in an arbitrary exercise of power by the King, which was at the time justified on the ground that the mines were required as a source of revenue. The same regalian right was recognized on the continent as in England, and of its origin, Gamboa, in his commentary on the mining ordinances of Philip II, thus speaks: "Upon the breaking up of the Roman Empire, the Princes and States which declared themselves independent, appropriated to themselves those tracts of ground in which nature has dispensed her most valuable products with more than ordinary liberality, *which reserved portions or rights were called rights of the Crown*. Among the chief of the valuable products are the metallic ores of the first class, as those of gold and silver and other metals proper for forming money, which it is essential for sovereigns to be provided with in order to support their warlike armaments by sea and land, to provide for the public necessities, and to maintain the good government of their dominions."

It follows from the views we have thus expressed, that the first position advanced by the defendants can not be sustained ;

that the gold and silver which passed by the cession from Mexico were not held by the United States in trust for the future State; that the ownership of them is not an incident of any right of sovereignty; that the miners' were held by the United States in the same manner as they held any other public property which they acquired from Mexico, and that their ownership over them was not lost or in any respect impaired by the admission of California as a State.

The second position of the defendants is, that if the minerals did not vest in the State by her admission into the Union, they remained the property of the United States notwithstanding their patents to the Fernandez and to Fremont. This position is not based upon any language of the patents; for it is admitted that their terms of grant would operate, in case of a conveyance of an individual, to pass all the interest which the grantor could possess in the land. It is based upon the supposition that as the act of March 3, 1851, provides for the recognition and confirmation of the rights acquired by the grants from Mexico, the patents were only intended as evidence on the part of the United States of such recognition and confirmation. By those grants, as we have seen, no interest in the minerals of gold and silver passed to the grantees, and if the patents amount only to an acknowledgment of the rights derived from the former government, that interest still remains in the United States. This view of the patents is not justified by any provisions of the act. The object of the act is to "ascertain and settle" private land claims in California. This object is declared in the first section. It is not merely to ascertain but "to settle" the claims; that is, to establish them—to perfect them, by placing them, so far as the government is concerned, beyond controversy. This ascertainment is intrusted by the act to a board of commissioners, and to the courts. By proceedings before them the validity of the claims is determined; yet little benefit would result to the claimants from such determination, if the act required or authorized nothing further. Many of the claims held in this State fall far short, even when confirmed, of being available titles; some are mere inchoate titles, some are equitable titles, and some are to specific quantities of land situated within boundaries embracing a much larger extent. The act, therefore, provides for

proceedings to be taken after the claims have been subjected to the investigation of the board and the courts. The lands claimed are to be surveyed and segregated from the public domain by the officers of the government, and patents are to issue to the claimants. The issuance of the patents does not depend upon the character of the claims, whether they be legal or merely equitable, or whether they be of specific tracts or floating interests. It depends solely upon the recognition of their validity by the decree of confirmation. "For all claims finally confirmed," reads the act, "by the said Commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plot or survey of the said land, duly certified and approved by the Surveyor General of California."

There is nothing in the act restricting the operation of the patents thus issued to the interests acquired by claimants from the former government, or distinguishing the patents in any respect from the general class of conveyances made, under that designation, by the United States. To all claimants alike, whose claims have been finally confirmed, patents are to issue without words of reservation or limitation, with the exception that they shall not affect the interests of third persons—an exception which would exist independent of its legislative recognition. Such being the case, the question arises as to what passed by the patents to the Fernandez and to Fremont, and to this question there can be but one answer: all the interest of the United States, whatever it may have been, in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land; and that term, says Blackstone, "includes not only the face of the earth, but everything under it or over it. And therefore," he continues, "if a man grants all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters and his houses, as well as his fields and meadows." (Book II, 19.) Such is the view universally entertained by the legal profession as to the effect of a patent from the general government. The United States occupy, with reference to their real property within the limits of the State, only the position of a private proprietor, with the

exception of exemption from State taxation, and their patent of such property is subject to the same general rules of construction which apply to conveyances of individuals. From the operation of conveyances of this nature, that is, of individuals, the minerals of gold and silver are not reserved unless by express terms. They pass with the transfer of the soil in which they are contained. And the same is true of the operation of the patent—the instrument of transfer of the governmental proprietor, the United States; no interest in the minerals remains in them without a similar reservation. Nor is there anything in the language of the Supreme Court, in the opinion rendered in the Fremont case, which gives countenance to any other view. The Attorney General of the United States objected to the confirmation of the claim of Fremont upon the ground that the grant to Alvarado contained mines of gold and silver. His argument was to this effect: that as the mines did not pass to the grantee by the Mexican law, the claim should not be confirmed, as Fremont would obtain as a consequence of such confirmation a patent which would pass the minerals, to which, by the original grant, he was not entitled. But to this the court replied, that under the mining laws of Spain the discovery of a mine of gold and silver did not destroy the title of the individual to the land granted, and that the only question before the court was the validity of the title; and whether there were any mines in the land, and if there were any, what were the rights of sovereignty in them, were questions which must be decided in another form of proceeding, and were not submitted to the jurisdiction of the commissioners or the court by the act of 1851; in other words, the court said, in substance, that its consideration was confined to the title presented, and the effect of its decree and the patent following it upon the ownership of the minerals was a matter with which it had nothing to do.

The construction given by the United States to their patents, ever since the organization of the government, has uniformly been to the same effect. In several of the States, particularly those carved out of territories ceded by Virginia, North Carolina and Georgia, and out of the territory acquired by the treaty with France in 1803, and by the treaty with Spain in 1819, the title to a large portion of the lands is held under

patents from the United States. Some of these patents were issued upon a sale of lands, some of them upon a donation of lands, and some of them upon a confirmation by boards of commissioners of previously existing grants of the former governments. They were issued to extensive tracts in the Territories of Louisiana, Mississippi and Florida, and in many cases they embraced lands in which minerals of gold and silver and other metals existed. Yet in no instance, whether the patents were issued upon a sale or donation of lands, or upon a confirmation of a previously existing grant, have the United States asserted any right to the mines as being reserved from the operation of the patents. They have uniformly regarded the patent as transferring all interests which they could possess in the soil, and everything imbedded in or connected therewith. Whenever they have claimed mines, it has been as part of the lands in which they were contained, and whenever they have reserved the minerals from sale or other disposition, it has only been by reserving the lands themselves. It has never been the policy of the United States to possess interests in land in connection with individuals.

Judgment affirmed.

Moore v. Smaw.—BALDWIN, J.—I concur in the judgment in this case for the reasons given by the Chief Justice.

**LORIMIER ET AL., Administrators of Wilson, v. LEWIS
ET AL.**

(1 Morris, 253; 39 Am. Dec. 461. Supreme Court of Iowa, 1843.)

Nature of action of forcible entry. All that is necessary to sustain this action is, that defendant should forcibly and illegally have turned the plaintiff out of possession. It may be brought even against the legal owner.

President no power to let mines. The president, by virtue of his office, and independent of statutory authority, has no power to lease the lead mines on the public domain.

Acts concerning the same subject, passed at the same time, should if possible receive such construction as will give effect to both.

This was an action of forcible entry and detainer, in the District Court of Dubuque County, on appeal from a justice of

the peace, where verdict and judgment had been rendered for the plaintiffs.

The following agreement was made by the parties :

“ That the above case shall be submitted to the district court aforesaid, at the present term, and the issues of law and fact submitted to the court.

“ It is admitted that the *locus in quo* is public land, belonging to the United States ; that it has not been proclaimed for sale, or subject to private entry, by any existing law of the United States. Upon the trial here, the plaintiffs admit that a lease of the lot in question was duly made and executed by John Flanagan, agent of the United States lead mines, to the defendants (a copy of which is made part of this case); that the defendants entered under and by virtue of said lease.

“ The plaintiffs further admit and agree that the letters of appointment of the said Flanagan, as agent of the lead mines, together with any and all instructions which said Flanagan may have received in reference to leasing the lands within the mineral district, or upper Mississippi, or northwest lead mines, whether from the president of the United States, the treasury, war, or ordinance departments, may be received by the court as genuine, and coming from the public officers from whom they purport to come. It is further agreed by the parties, that if the court shall be of opinion that the said John Flanagan had legal authority to grant said lease, then judgment is to be rendered for the defendants. But if the court shall be of opinion that said John Flanagan had no legal authority to grant said lease, the judgment rendered in the court of the justice of the peace to be affirmed.

“ This agreement shall also extend to the admission of testimony in the Supreme Court of Iowa. It is understood that this agreement is not to operate as a waiver to the right of appeal, or suing out a writ of error by either party.”

TIMOTHY DAVIS, attorney for plaintiffs.

BERRY & WILSON, attorneys for defendants.

The case was argued before the district court, at February term, 1843, and the judge being of opinion that the right to lease the lead mines, as claimed, did not exist, the judgment was for the plaintiffs.

Per Curiam: MASON, Chief Justice.

This was an act of forcible entry and detainer, commenced before a justice of the peace, and brought by an appeal into the District Court of Dubuque County. This case was submitted to that court on an agreed statement of facts, which, although affording but an imperfect view of the whole matter, must constitute the only ground for a decision here.

It is admitted that the *locus in quo* was public land belonging to the United States, and that the defendants entered under and by virtue of a lease from the agent of the United States lead mines; but the plaintiffs' ground of action is not set forth, nor whether they or any one else were in possession of the lands at the time the aforesaid lease was executed. By mutual consent the whole case is to turn upon one point: the power of the president of the United States to authorize the granting of leases of this nature for any or all lead mines on the west side of the Mississippi river.

It was contended, in the course of the argument, that the plaintiffs below in this case were themselves sheer trespassers, and much stress seemed to be laid on that circumstance. That fact, however, is in no manner mingled with this case. The action is not ejectment, but forcible entry and detainer, and may be brought by a trespasser, even against the legal owner of the premises. All that is necessary to sustain this action is, that the defendant should forcibly and illegally have turned the plaintiff out of possession.

Besides, the stipulations in the agreement make the whole to depend upon the right of the agent to lease, and we can not travel beyond that agreement. Nothing is therein mentioned of the plaintiffs being trespassers. We have therefore no data by which to ascertain the title of the plaintiffs, nor if we had would that be a proper subject of consideration in this form of action.

It has been urged that the president is vested with the power in question in consequence of the general supervision of the public lands with which he is by law intrusted. Such a power, however, should have a more substantial basis; it is not a branch of prerogative. It should not result from implication. The right to lease the lead mines would imply a like power in relation to all other lands of the territory. If a lease for three years can be legally given, independent of

statutory authority, why not for fifty? And if the president can grant such leases Congress itself can afterward only dispose of the reversion. Whole States might thus have been peopled by a race of tenantry, holding not under the government but under the executive.

Probably from such views of the case, serious doubts have sometimes been entertained whether even Congress possesses the legitimate power to authorize such leases. The Supreme Court of the United States have recently set this question at rest: *United States v. Gratiot*, 14 Peters, 526.

We feel no disposition to rebel against that decision. We think, however, that in such cases the constitutional power of Congress is exerted to its utmost tension, and that under such circumstances no power of this nature can exist independent of an unequivocal statute. None should result from inference, or be obtained by loose construction. If Congress, either directly or by a fair and reasonable construction of any statute, have authorized the leasing of the lead mines in the manner pursued by the agent at Dubuque, the decision of the district court must be reversed—otherwise not.

What authority, then, has been conferred by statute to justify such leasing? None has been pointed out, except that derived from two acts of Congress, both passed March 3, 1807. One of these, entitled "An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," authorizes the president to lease, for a term not exceeding five years, any lead mine which has been or may hereafter be discovered *in the Indian Territory*. This act, so far from giving the authority contended for, raises a strong inference against it, agreeably to the maxim, *inclusio unius est exclusio alterius*.

The express power given to lease in the *Indian Territory* is local, and, inferentially, withholds the like power to lease elsewhere. It also goes far to overthrow the position assumed in the argument, that the law, having intrusted the president with a general supervision of the public domain, he possesses the power to lease the lead mines in the absence of any express statute on the subject. If the executive was already vested with a general power of this nature, why should it be

again conferred upon him in a particular case? By the passage of the act referred to, we have at least a legislative exposition of the law on this subject, independent of statute.

But reliance is chiefly placed upon the other statute referred to, bearing even date with the above mentioned. It is entitled "An act to prevent settlements being made on lands ceded to the United States, until authorized by law." The first section of that act prescribes certain penalties and forfeitures in case of unauthorized settlements upon the public lands. The president is also empowered to direct the marshal to remove intruders *and also to take such other measures, and to employ such military force as he may judge necessary and proper to effect such removal.* It is contended that inasmuch as the president is hereby authorized "to take such other measures" as he may judge necessary and proper to remove intruders, he may make a lease for that purpose; that instead of ordering out the military force, he may lease the ground to some other citizen, and then leave the latter to remove the intruder by legal and peaceable means.

Such would be a most liberal construction of the statute, under any circumstances; but the reasoning would be much more plausible were it not for the absence of one essential fact. There is nothing to show that the lease in the present case was given for any such purpose. It does not appear from the agreed statement of facts that any person was upon the land when the lease was made to the defendants below. Admitting that the president would be authorized to employ this "measure" to remove a trespasser, could he anticipate the trespass and lease the lands to prevent intrusion under the general authority to select his own measures to remove intruders? Can he dispose of the whole public domain for an unlimited space of time before yet a single intruder has set foot upon it? The proposition carries its own refutation; and yet if the position taken by the counsel for the defendants be tenable, we shall be irresistibly driven to this sweeping conclusion.

The only remaining argument that we recollect to have heard urged for the plaintiffs in error (though, as we find no brief among the papers of the case, we may have forgotten some points) is derived from the power to lease contained in the second section of the last mentioned statute. That

section commences with a provision in favor of those who had settled on the public lands prior to that date, authorizing them to remain upon making application to the proper land officer, and complying with certain conditions therein prescribed, and concludes with the following proviso: "That in all cases where the tract of land applied for includes either a lead mine or salt spring, no permission to work the same shall be granted without the approbation of the president of the United States, *who is hereby authorized to cause such mines or springs to be leased for a term not exceeding three years, and on such conditions as he shall think proper.* It is insisted on the one hand that this proviso contains a general authority to lease mines and salt springs. This can not be the proper construction of the statute. The authority herein contained must be explained by the context, the proviso by the subject-matter of the section. That section relates entirely to the case of persons who were then upon the public lands; allows them to remain upon complying with certain requisites, unless the tract embraces a lead mine or salt spring, in which case the approbation of the president is made necessary. Then comes the clause under consideration, authorizing the president to lease "such mines and salt springs" for the term of three years. What mines and salt springs are here referred to? Clearly those located on tracts then occupied, and to the further occupancy of which the approbation of the president is made requisite.

This view of the matter is confirmed by the passage of the other statute already referred to. If the proviso we have been considering was intended to confer a general power of leasing all lead mines and salt springs, could there be any necessity for other statutes, giving the special power to lease *in the Indian Territory*? These two acts were passed not only by the same Congress, but on the same day, and there is therefore the strongest necessity for giving them such a construction as to give effect to both. This will be best accomplished by regarding the one as local and the other as applicable to all lands *then occupied*. The case at bar can not be placed in a predicament to be affected by either of these statutes. We therefore conclude that there is no law to authorize the leasing of the lead mines within this territory.

Judgment below affirmed.

McCLINTOCK v. BRYDEN ET AL.

(5 California, 97. Supreme Court, 1855.)

¹ **Statutory precedence of miner's rights.** By statute in California a person who settles for agricultural purposes upon any of the mining lands of the State, settles upon such lands subject to the rights of miner, who may proceed in good faith to extract any valuable metals to be found in the lands so occupied by the settler in the most practicable manner in which they can be extracted, and with the least injury to the occupying claimant.

Appeal from the District Court of the Tenth Judicial District, Nevada County.

The facts are distinctly stated in the opinion of the court.

DIBBLE & THAYER, for appellants.

CONN & TWEED, for respondent.

BRYAN, J., delivered the opinion of the court; HEYDENFELDT, J., concurred.

This cause comes up upon an appeal from an order granting an injunction, and it will not be necessary to notice many of the points made by counsel in their briefs and arguments upon the hearing of the cause.

McClintock, the plaintiff below, claims that he has settled upon, and now occupies in good faith, a tract of land in the county of Nevada for grazing and agricultural purposes; that he had made large and valuable improvements upon the same, and that he had quietly and peaceably enjoyed his possession,

¹ *Gillan v. Hutchinson*, 2 M. R. 317; *Levaroni v. Miller*, 12 M. R. 232.

for some years prior to the entry of defendants, in the business of farming and grazing. The defendants below set forth in their answer that the land so claimed by McClintock is mineral land, and that whilst engaged in the business of extracting gold from the earth, they advanced their works to the inclosure of McClintock, the plaintiff, and that the earth contained within the inclosure of the plaintiff was valuable for gold-mining purposes.

The record discloses that upon affidavits setting up these facts, amongst others, the county judge of Nevada county dissolved the injunction granted by the district judge, and that the dissolution of the same was followed by a renewed order of injunction from the district judge. It is further shown that the district judge refused to set aside the writ of injunction upon application made to him for that purpose. The appeal having been taken from the order granting the injunction, we deem it only necessary to notice the main issue raised by the bill, answer, and affidavits in the record.

The important question is now presented to us, as to what rights a person may acquire, if any, in the gold-bearing districts of this State by virtue of his prior possession, by means of inclosures and improvements for farming and grazing purposes. It has been the admitted policy of the different governments of the world for many ages, when those governments have had jurisdiction over soil containing valuable minerals, to reserve those lands for the use of the government, and exclude them as far as possible from any claim of private ownership. Many reasons have been given for this policy, prevailing from the earliest times. One, that the government having alone the right of coinage, it was incident to that right that it should control the metals to be coined; others have thought that the doctrine became general in the days of the feudal ages, when nations were almost constantly in a state of war, and the revenues of kings were much straitened by the frequent and heavy charges of expensive armaments, and that the necessities of revenue and currency excluded the idea that any subject of the crown should, by virtue of his ownership of lands, have it in his power to prevent the extraction from the soil of the wealth so much needed.

But, whatever may have been the origin of this doctrine, it is not uncertain that it has been acted upon down to our own times.

The government of this State being a government of the people, has, as far as its action has been determined, modified this claim to the precious metals; and deriving its revenue from other sources, has, by its uniform policy, permitted its citizens, as well as the citizens and subjects of other States, to use the public lands for the purpose of extracting the most valuable metals from their soil.

The general government has, by acts of Congress, reserved from settlement under her laws, regulating the occupation of the public lands, all lands upon which mines may exist.

The government of the United States will issue no patent to a pre-emption claimant upon mineral lands, who claims the same for agricultural purposes. The plaintiff below has then acquired no right to his settlement from the general government. The State of California having an undoubted right to pass laws regulating the manner of defending and possessing the public lands within her borders, by virtue of her police powers, if she has no higher right, has proceeded to define what lands may be possessed for agricultural purposes, in the act of April 11, 1850, and the act of April 20, 1852, (see Compiled Laws, 896,) and by the provisions of those laws, she expressly excepts from their operation, and refuses to protect any location upon lands containing any of the precious metals. The act of April 13, 1850, passed "for the better regulation of the mines, and the government of foreign miners," seems to give, by necessary implication, whatever right the State might have in the mineral in the soil, and the right to mine, to all native born or naturalized citizens of the United States who may wish to toil in the gold placers.

The act of 1851, regulating proceedings in civil cases, section 621, defining "that in actions respecting mining claims proof shall be admitted of the customs, usages, or regulations established or in force at the bar or diggings embracing such claim," would seem to imply a permission upon the part of the State, to the miner, to seek wherever he chose in the gold-bearing districts for the precious metals, and would seem to extend to him whatever right she might have to the mineral when found.

But the inquiry would naturally arise here, as to what right the plaintiff can have in maintaining possession of the farm he claims, situate upon mining lands, to the exclusion of the miner whilst he is in good faith searching for gold. The policy of both the general and state governments has been to reserve these lands from settlement for agricultural purposes. All of the legislation of both governments, bearing upon this question, denies the claim of the settler for agricultural purposes upon mineral lands; and instead of denying to the miner the privilege of extracting gold wherever found, the one by its tacit permission and the other by the uniform tendency and implication of its laws, has given him that privilege, and allowed him to define and regulate his location in the mines by the local customs and laws prevailing at the place where he is following his mining avocation.

It has been contended in this cause, that the location of the plaintiff for agricultural purposes upon the lands in dispute had taken place prior to any legislation upon the subject of mining lands and that therefore those laws passed with reference to the business of mining can have no effect in denying his right to his possession, because they would be retroactive in their operation. I can not perceive the force of this objection. The plaintiff never had, from the time of his location, any right derived from either government to the possession of mineral lands inclosed by him, to the exclusion of miners who were in good faith proceeding to extract the gold from the earth.

The plaintiff is in possession without showing a right of property, and relies upon his mere possession, by buildings and inclosures, for his right to recover in this action. A bare prior possession of agricultural lands which were public lands, has been held sufficient, in some of the new States and Territories of the Union, to sustain ejectment as against a person invading that possession.

The wants and interests of a country have always had their due weight upon courts, in applying principles of law which should shape its conditions; and rules must be relaxed, the enforcement of which would be entirely unsuited to the interests of the people they are to govern. In the new agricultural States, it was the policy of the government, as well as of the

people, that the waste lands should be early settled, cleared, and brought into a state fit for cultivation.

The actual settler upon these lands, over much of the territory of the Union, was allowed the right of pre-emption, and the government recognized in him, by virtue of his settlement, a species of property in the public lands. It was necessary, for the encouragement of actual settlers, that without legal title to their property, and without actual inclosures, they should be able to remove any person entering upon lands claimed by them. But how is it with the case before us? The plaintiff settles upon and claims mineral lands for purposes of agriculture, to the exclusion of miners, against the policy of both the general and state governments, without right, and claims protection in his possession merely because he was first upon the ground; that he had fenced in a farm and was occupied in the business of raising crops. The maxim of the law, "*qui prior est in tempore, potior est in jure*," can not be applied in protection of a person who settles upon lands reserved from settlement by the policy of the law, as against one entering for a purpose encouraged wherever minerals may be found.

To sustain the action of ejectment in favor of a party relying upon mere prior possession, the defendant in the action is treated as an intruder and wrongdoer, who invades without right in the premises. The defendants below were in the exercise of a peaceable and lawful calling, and in their search for gold, in the progress of their works, they discovered that the plaintiff had inclosed ground in a mining district which they believed to be valuable for gold-mining purposes, and upon which they entered for the purpose of carrying on their business of extracting gold. This was not (in a mining district) the act of intruders or wrongdoers, but the act of persons following a lawful and honorable pursuit, upon ground reserved to such purposes by both the policy and laws of this State.

If the doctrine were otherwise, it is plain to perceive that persons without any right but that of possession, could, under the pretense of agriculture, invade the mineral districts of the State, and swallow up the entire mineral wealth by settlements upon one hundred and sixty acre tracts of land. It would be using the law to a very bad purpose if we should allow a person who has no evidence of title but his improve-

ments, and no right but that of the naked possession he has usurped, to destroy, for his own benefit, the business of a neighborhood, and put as well the government as the mining public at defiance.

I therefore hold, that a person who has settled for agricultural purposes upon any of the mining lands of this State, has settled upon such lands subject to the rights of miners, who may proceed in good faith to extract any valuable metals there may be found in the lands so occupied by the settler, in the most practicable manner in which they can be extracted, and with the least injury to the occupying claimant, according to the express statutes of this State.

The order granting the injunction in the court below is therefore reversed, with costs.

BURDGE V. SMITH ET AL.

(14 Californin, 380. Supreme Court, 1859.)

Mineral land excepted in pre-emption acts. Neither the act of 1858, as to the location of seminary land, nor the act of Congress donating it, allows mineral land to be located.

¹ **Presumption that land is public.** The presumption under our statute is that all land in the State is public land until the legal title is shown to have passed from the government to private parties.

Idem — Presumption from possession. This presumption is reconcilable with the presumption of title arising from possession.

² **Possession as proof of title.** The possession of agricultural land is *prima facie* proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies.

Appeal from the Eleventh District.

Plaintiff avers himself to be the owner in fee and possessed of a tract of land containing about five hundred acres. That for several years he has had a fence around the same, and has used it for agricultural and grazing purposes. That defend-

¹ *Smith v. Doe*, 5 M. R. 218.

² *Rupley v. Welch*, 4 M. R. 243; *Rogers v. Soggs*, 14 M. R. —.

ants entered upon a portion of the land, and by digging up the soil, erecting a dam, and carrying on mining generally, have flooded and injured the land greatly, etc., etc. Defendants are miners and claim the right to go upon the land as public mineral land and extract the gold. Plaintiff proved his inclosure and cultivation, and also gave evidence tending to show that he had located the tract as seminary land. He sues for damages and an injunction, etc. On the trial plaintiff asked several instructions which were refused.

The main instructions refused were to the effect that the actual possession of the land, prior to and at the time of defendant's entry, was evidence of a fee simple title in plaintiff, and that ownership of the gold followed ownership of the soil; and that in such case miners have no right to enter upon the land to work for gold.

That the right to mine, even if it existed, did not authorize defendants to construct a dam on the land, and that they are responsible for damages caused by flooding, etc.

The court instructed the jury, in substance, to find for defendants, if they believed the land to be public mineral land used by plaintiff for agricultural and grazing purposes, and entered on by defendants in good faith for mining purposes, and worked in the usual way.

Verdict for defendants, judgment accordingly, motion for new trial overruled, plaintiff appeals.

SUNDERLAND, for appellant.

E. B. CROCKER and HORACE SMITH, for respondents.

BALDWIN, J., delivered the opinion of the court, FIELD, C. J. and COPE, J., concurring.

The plaintiff took up a portion of public land, professing to enter it by virtue of the act of 1858, as seminary land, to which the State is entitled under act of Congress. The land was mineral land, and the defendants went upon it to extract the gold, and to use water running through it as auxiliary to mining.

The plaintiff can derive no aid from his location on this

tract as seminary land under the act of the legislature, for neither that act nor the act of Congress allows mineral land to be so appropriated. The presumption raised by statute (Wood's Dig. 527; Stat. 1856, 54) is, "that all lands in this State shall be deemed and regarded as public lands until the legal title is shown to have passed from the government to private parties." It is true that we have repeatedly held that possession is proof of ownership in the possessor; but these presumptions are not necessarily irreconcilable. The possession of agricultural land may draw to it this presumption against a trespasser in favor of the possessor; but when it is shown that a person goes upon mineral land to mine there is no presumption that he is a trespasser; for if it be not private property it is his right so to go, and the statutory rule of presumption, that in the absence of a showing of title in the person claiming to hold it for agricultural purposes it is public land, applies.

To hold that a mere entry upon a tract of public mineral land, of any given extent, gives a right to exclusive occupancy and enjoyment to one man, would be to hold that the whole mineral region might be appropriated and monopolized by a few men—a doctrine which would effectually exclude the mass of the people of the State from a participation in the mines. We have often held that no such claim can be recognized. In this case there are no circumstances which call for any modification of the principle which allows a right of entry upon the public mineral land by those desiring to work the mines or extract the minerals found on a tract claimed to be possessed by a mere prior locator. If any modifications be necessary to secure the rights of the parties first in possession we must reserve the consideration of them until a proper case arises.

Judgment affirmed.

MORTON ET AL. V. STATE OF NEBRASKA ET AL.

(21 Wallace 660. 'Supreme Court of United States, 1874.)

¹ **Salines reserved by the United States—General policy of government.**

The policy of the government since the acquisition of the northwest territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform. This policy has been applied to the Louisiana territory, acquired from France in 1803, and probably would apply to Nebraska without the act of July 22, 1854; but under that act it applies, at least so far as to render void an entry where the salines, at the time, had been noted on the field books, were palpable to the eye, and were not first discovered after entry.

² **Patent contrary to reservation.** A patent for a saline which was under the general law reserved from sale, is void.

"Vested rights" construed. When a statute provides for the protection of vested rights, it means rights lawfully vested, and this excludes the protection of locations of salines, which are reserved from sale or entry.

Error to the Supreme Court of Nebraska. Morton sued certain tenants of the State of Nebraska in ejectment, to recover three hundred and twenty acres of salt land, *salines*, in the said State—a State formed, as every reader of these volumes is aware, out of that vast region formerly known as the Territory of Louisiana, and purchased in 1803 by us from France. The land in question was palpably saline, so incrustated with salt as to resemble snow-covered lakes. The salines in question were noted on the field-books, but these notes were not transferred to the register's general plats. The State intervened in the suit, and by its own request was made a defendant.

The plaintiff based his title under locations of military bounty-land warrants at the land office in Nebraska City, in September, 1859. These warrants were issued by virtue of the Military Bounty-Land Act of September 28, 1850, which declared that such warrants might be located at any land office of the United States, upon any of the public lands in such district *then subject to private entry*. The locators of the warrants, it appeared, before they made their entries, were told that the lands were salines. The State now set up that the locations were without authority of law, because the lands, being saline lands, were not subject to such entry.

¹ *Cowan v. Hardeman*, 13 M. R. —; *Indiana v. Miller*, 3 McLean, 151.

² *Kahn v. Old Telegraph Co.*, 11 M. R. 646.

The question thus was whether, in Nebraska, saline lands were open to private entry; or more strictly, whether they were so under circumstances such as those above stated.

It was not denied by the plaintiff that the practice of the Federal government, as exhibited by many acts of Congress (which being referred to in the opinion of the court, need not here, by the reporter, be particularized,) from an early date, had been to exclude this sort of land, with certain other sorts, from public sale, generally. It had done so confessedly from the Northwestern Territory, and from the Territory of Orleans, the now State of Louisiana. But the defendants conceived—and such was their position—that under the statutes regulating the matter in *Nebraska*, this was not so.

The matter was to be settled by certain acts of Congress standing perhaps by themselves; or, if their language was not clearly enough applicable to the district of Nebraska, by such acts read by the light of the policy of the government and its numerous enactments on the main subject.

The first act which bore directly upon the matter was an act of March 3, 1811, 2 Stat. at Large, 665, § 10, “providing for the final adjustment of claims to lands, and for the sale of the public lands in the Territories of Orleans and Louisiana.” This act created a new land district, and authorized the president to sell any surveyed public lands in the Territory of Louisiana, with certain exceptions named:

“And with the exception also of the *salt springs* and lead mines, and lands contiguous thereto.”

Next came an act, approved July 22, 1854, 10 Id. 308, more immediately bearing on the matter: “An act to establish the offices of surveyor-general of New Mexico, Kansas, and *Nebraska*, to grant donations to actual settlers therein, and for other purposes.”

This was an act of thirteen sections, and, as its title shows, relating to three different Territories.

The first three sections related, without any question, exclusively to the Territory of New Mexico.

The first of them authorized the appointment of a surveyor general for *that* Territory, with the usual powers and obligations of such officers.

The second made a donation of a quarter section of land to

all white males residing in it, who had declared an intention, prior to January 1, 1853, to become citizens; and also (on condition of actual settlement, etc.) to every white male citizen above twenty-one years of age who should remove or have removed there between January 1, 1853, and January 1, 1858.

The third authorized a patent for *such* land to issue.

Then came in a fourth section in these words :

"None of the provisions of this act shall extend to mineral or school lands, salines, military or other reservations, or lands settled on or occupied for purposes of trade and commerce, and not for agriculture."

This fourth section, as the reader will observe, does not in terms refer to the Territory of New Mexico, but says *none of the provisions of this act, etc.*

However, the fifth section enacts "that sections 16 and 36 in each township, shall be, and the same are hereby reserved for the purpose of being applied to schools in the *said Territory*," that is to say, the Territory of New Mexico; and the sixth reserves a quantity of land equal to two townships, for a university *there*.

The fourth section, therefore, as the reader will have noted, is interposed between sections which relate exclusively to the Territory of New Mexico; though it, itself, does not in terms so exclusively relate. The fifth section also, as he will have noted, makes a reservation for schools, a matter which the fourth section in some way apparently had also legislated upon.

Then came a seventh section, enacting "that any of the lands not taken under the provisions of this act" are subject to the operation of the Pre-emption Act of 4th September, 1841, 5 Stat. at Large, 456. [An act which by its tenth section authorizes certain persons to enter one hundred and sixty acres at the minimum price, and enacts "That no lands on which are situated any *known* salines or mines shall be liable to entry under and by virtue of the provisions of this act."]

Section eight authorizes the surveyor-general to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and lands covered thereby are to be reserved from sale.

Section nine gives the secretary of the interior power to "issue all needful rules and regulations for fully carrying into effect *the several provisions of this act.*"

Then comes for the first time, in section ten, a *specific* reference to Nebraska. This tenth section authorizes the appointment of surveyors-general for Nebraska and Kansas, with the usual powers and obligations of such officers. It authorizes them to locate their offices at certain places, etc.

The eleventh section directs surveys in the said Territories.

The twelfth subjects "all the lands to which the Indian title has been or shall be extinguished within said Territories of Kansas and Nebraska, to the operations of the Pre-emption Act of 4th September, 1841," the Pre-emption Act mentioned above in the seventh section. And the thirteenth makes two new land districts, authorizes for these two districts the appointment of registers and receivers, and concludes the statute with an enactment thus:

"And the president is hereby authorized to cause the surveyed lands to be exposed to sale, from time to time, *in the same manner* and upon the same terms as the other public lands of the United States."

Whether, therefore, this section four, interposed as it is between sections relating exclusively to New Mexico, did, notwithstanding its general language, bear on the Territory of Nebraska, was one question raised by the plaintiff in the case, who denied that it did or could. He asserted that it meant "none of the *foregoing* provisions, etc.; that is to say, the provisions in section two about the *donation* of land.

The State, on the other hand, insisting that it did apply to the other two Territories mentioned in subsequent sections of the act, asserted also that whether it did or did not was unimportant, since by the twelfth section the lands in Nebraska were subjected to the provisions of the Pre-emption Act of 1841, which exempted "all *known* salines;" within which class, as it happened, those in question came.

The State, however, relied also on two other acts subsequent to that already set forth, of July 22, 1854. The acts were thus:

1st. An act of the 3d of March, 1857, 11 Stat. at Large, 186, "to establish three additional land districts in the Territory of Nebraska."

This act re-arranged the land districts of Nebraska, authorized the appointment of officers for them, and by one section enacted—

“That the president is hereby authorized to cause the public lands in said districts to—with the exception of such as *may have been or may be reserved for other purposes*—be exposed to sale in the same manner as other public lands of the United States.”

2d. An act of the 19th of April, 1864, 13 Id. 47, “to enable the people of Nebraska to form a constitution and State government, and for the admission of such State into the Union,” etc.

This act enacts:

“SECTION 11. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use; the said land to be selected by the governor thereof,” etc.

Under this act (after the admission of Nebraska as a State into the Union), its governor made a selection of twelve salt springs, the ones now in question being of the number.

This act, however, contained a proviso which the plaintiffs conceived covered the present case and destroyed the value to the State (if it had any) of the main enactment. The proviso was thus:

“*Provided*, that no salt spring or lands, the right whereof is now vested in any individual or individuals, shall by this act be granted to said State.”

It may be here remarked that the plaintiffs had obtained certificates of entry for the lands in controversy, and patents for them had been issued.

The patents were transmitted from the General Land Office at Washington to the local office in Nebraska. Before their delivery, however, the commissioner of the General Land Office, ascertaining that the lands patented were saline lands and not agricultural, recalled the patents and canceled the location.

The court below gave judgment for the State. From that judgment the other side brought the case here.

MONTGOMERY BLAIE and R. H. BRADFORD, for plaintiffs in error.

WILLIAM LAWRENCE and E. R. HOAR, for the State or its tenants.

In behalf of the plaintiffs in error (plaintiffs also below), it was argued that the act of July 22, 1854, though purporting to be one statute, and in form such, was obviously in fact two statutes; the first statute coming to the tenth section and relating exclusively to New Mexico; the other, running from the beginning of that tenth section to the end of the thirteenth, and relating exclusively to Kansas and Nebraska. The case was the case of two separate bills referring to distinct but cognate subjects tacked together, and passed through Congress as one statute (a very familiar case in the legislation of Congress); or of one bill where two cognate and distinct subjects were acted on in one bill; one subject in the first part and the other in the last. Viewing the statute in this light, the fourth section of the first act could not be made to overlap and cover any portion of the second act.

But if this were not the obvious history or character of the statute, the language of the fourth section is not the language of "reservation." The word "reserved" or "reservation" does not occur in it. The section was, therefore, to be confined to operating upon what immediately precedes it; that is to say, it was to be read as a prohibition upon the occupancy of the mineral, saline and school lands of New Mexico, by settlers under the donation clause of the act contained in sections two and three preceding. New Mexico in 1854 was a distant, and agriculturally considered, a sterile territory, though one having very rich mines and salines. The object of Congress was to invite *agricultural* settlers into it. Donations of agricultural lands to such persons were requisite to secure this object; and even such donations hardly secured it. But donations of the invaluable mineral lands and salines there were not at all requisite to invite thither the enterprising miner and salt-maker. These persons would go there if they could purchase at private sale or lease the mines or salines. Congress, therefore, would have been without excuse in giving away *these* mines and salines.

The fourth section is, therefore, not to be regarded as a reservation at all, but as a provision withdrawing mines, salines, and other sorts of land named in it, from the operation of the donation clauses preceding it.

Any other construction of the section makes the statute tautologous. The section, it will be noted, operates, in whatever way it does operate, on *school* lands as much as on salines. If it is to be taken as a reservation, operating over subsequent parts of the act—a reservation generally, on school lands—then as to New Mexico it makes the identical enactment which is made in the fifth section. This, as to that act, is a *reductio ad absurdum*. While a similar sort of demonstration appears in regard to the Territories of Nebraska and Kansas, when you advert to the fact revealed by a reference to the statute-book, that a previous act, 10 Stat. at Large, 283, 289, the act of May 30, 1854, “to organize the Territories of Nebraska and Kansas,” by sections sixteen and thirty-four, reserves school lands in almost identical language for *them*. The language is, in the case of each Territory—

“Sections numbered 16 and 36 in each township in said Territory, shall be and the same are hereby reserved for the purpose of being applied to schools in said Territory.”

The learned counsel argued further, that the proviso in the eleventh section of the act of April 11, 1864, was a plain recognition of a vested right—one made by its own patent—in the plaintiff.

They argued also that there having been no exhibition or evidence of salines apparent in the receiver's general plats, no knowledge of any was properly fixed on the plaintiff, and that the patents having once passed the seals of the General Land Office at Washington, the subsequent revocation was void. The plaintiffs were thus possessed of a legal title, and had a right to recover in ejectment.

Mr. Justice DAVIS delivered the opinion of the court.

The policy of the government since the acquisition of the Northwest Territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform. The act of 18th May, 1796, 1 Stat. at Large, 464, the first to authorize

a sale of the domain ceded by Virginia, is the basis of our present rectangular system of surveys. That act required every surveyor to note in his field-book the true situation of all mines, salt licks, and salt springs; and reserves for the future disposal of the United States a well known salt spring on the Scioto river, and every other salt spring which should be discovered.

These reservations were continued by the act of May 10th, 1800, 2 Id. 73, which created land districts in Ohio, with registers and receivers, and authorized sales by them, the preceding act having recognized the governor of the Northwest Territory and the secretary of the treasury as the agents for the sale of the lands. And the same policy was observed when provision was made in 1804 for the disposal of the lands in the Indiana Territory (embracing what is now Illinois and Indiana), 2 Stat. at Large, 277. It was then declared "that the several salt springs within said Territory, with as many contiguous sections to each as shall be deemed necessary by the president, shall be reserved for the further disposal of the United States." Without referring particularly to the different acts of Congress on the subject, it is enough to say that all the salines in the Virginia cession were reserved from sale and afterward granted to the several States embraced in the ceded territory. Congress, in the disposition of the public lands in the Mississippi Territory, Ib. 548, 3 Id. 489, and in the Louisiana purchase, preserved the policy which it had applied to the country obtained from Virginia. Over all the territory acquired from France the general land system was extended. The same rules which were prescribed by law for the survey and sale of lands east of the Mississippi river were transferred to this new acquisition. 2 Id. 324. At the first sale of lands in this region which the president was authorized to make, salt springs and lands contiguous thereto were excepted: Ib. 391. And this exception was continued when, in 1811, a new land district was created. Prior to this time no portion of the country north of the State of Louisiana had been brought into market. The act of March 3, 1811, authorized this to be done, but the president, in offering the lands for sale, was directed to except salt springs, lead mines, and lands contiguous thereto, which were reserved for the future disposal of the States to

be carved out of this immense territory, which included the present State of Nebraska: lb. 665, § 10. And so particular was Congress not to depart from this policy, that in giving lands, in 1815, to the sufferers by the New Madrid earthquake, every lead mine and salt spring were excluded from location. Indeed, in all the acts creating new land districts in the territory now occupied by the States of Arkansas and Missouri, the manner of selling the public lands is not changed, nor is a sale of salines in any instance authorized. On the contrary, they incorporate the same reservations and exceptions which are contained in the act of March 3, 1811. In all of them the act of 18th May, 1796, is the rule of conduct for all surveyor-general and their deputies, as the act of 10th May, 1800, is the rule for all registers, requiring them to exclude from sale all salt springs, with the sections containing them.

In this state of the law of saline reservations, the act of 22d July, 1854, was passed. It is by no means certain that the act of March 3, 1811, did not work the reservation of every saline in the Louisiana purchase, but without discussing this point, it is enough to say that the act of 1854 leaves no doubt of the intention of Congress to extend to the territory embraced by the States of Kansas and Nebraska the same system that had been applied to the rest of the Louisiana purchase. There was certainly no reason why a long-established policy, which had permeated the land system of the country, should be abandoned. On the contrary, there was every inducement to continue for the benefit of the States thereafter to be organized, the policy which had prevailed since the first settlement of the Northwestern Territory. In the admission of Ohio and other States, Congress had made liberal grants of land, including the salt springs. This it was enabled to do by reserving these springs from sale. Without this reservation it is plain to be seen there would have been no springs to give away, for every valuable saline deposit would have been purchased as soon as it was offered for sale. An intention to abandon a policy which had secured to the States admitted before 1854 donations of great value, can not be imputed to Congress unless the law on the subject admits of no other construction.

But the law of 1854, 10 Stat. at Large, 308, instead of manifesting an intention to abandon this policy, shows a purpose to

continue it. It was the first law under which lands were surveyed in Nebraska, offered at public sale, and so made subject to private sale by entry. By it surveyors-general for New Mexico, and for Kansas and Nebraska, were appointed, with the usual powers and duties of such officers. And although there are provisions relating to New Mexico applicable to that Territory alone, yet the leading purpose of this act was to bring into market, as soon as practicable, the lands of the United States in all of these Territories. In New Mexico this could not be done as soon as in Kansas or Nebraska, on account of the policy adopted of donations to actual settlers, who should remove there before the 1st of January, 1858, and because of the necessity of segregating the Spanish and Mexican claims from the mass of the public domain. For this reason, doubtless, local land offices were not created in New Mexico, but they were in Kansas and Nebraska, and registers and receivers appointed, with the powers and duties of similar officers in other land offices of the United States. And the president was authorized to cause the lands, when surveyed, to be exposed to sale, from time to time, in the same manner, and upon the same terms and conditions, as the other public lands of the United States. If there were no other provisions in the law than we have enumerated, we should hesitate to say, in view of the limitation on sales prescribed by law wherever public lands had been offered for sale, that they did not of themselves work a reservation of the land in controversy. In conducting the public sales the register always reserved salines, as it was his duty to do, when marked on the plats, and this was never omitted except by the neglect of the surveyors-general or their deputies. But the fourth section of the act removes all doubt upon that subject. That section declares that none of the provisions of this act shall extend to mineral or school lands, *salines*, military, or other reservations, or lands settled on or occupied for purposes of trade and commerce.

It is contended that this section applies to the donations, conceded in the preceding sections, to actual settlers in New Mexico. But why make this restriction? To do it would require the importation of the word "foregoing," so that the section would read, none of the (foregoing) provisions shall extend to salines or mineral lands. There is no authority to

make this importation, and in this way subtract from the general words of the section. The language of the section is imperative and leaves no room for construction. Besides, why should an intention be imputed to Congress to exclude actual settlers from saline lands, but leave them open to private entry by speculators? The legislation upon the subject of public lands has always favored the actual settlers, but the construction contended for would discriminate against them, and in favor of a class of persons whose interests Congress has never been swift to promote.

Apart from this, however, the purpose which Congress had in view is to be found in the unbroken line of policy in reference to saline reservations from 1796 to the date of this act. To perpetuate this policy and apply it equally to all the lands of the three Territories, was the controlling consideration for the incorporation of the section; and although the words of the section are loose and general, their meaning is plain enough when taken in connection with the previous legislation on the subject of salines. It can not be supposed, without an express declaration to that effect, that Congress intended to permit the sale of salines in Territories, soon to be organized into States, and thus subvert a long established policy by which it had been governed in similar cases. If anything were needed to show that the fourth section did reserve salines from sales, it can be found in the act of 3d of March, 1857, 11 Stat. at Large, 186, re-arranging the land districts in Nebraska. This act excepts from sale such lands "as may have been reserved." This is a declaration that lands had been reserved, and obviously it is a legislative construction of the fourth section of the act of 1854, for nowhere else except by implication, had there been reservations of any sort in the Territory of Nebraska.

Besides this, the Nebraska enabling act of April 10, 1864, 13 Id. 47, affords still further evidence that the act of 1854 was intended to reserve salines. The purpose of reserving them was to preserve them for the use of the future States, and no State had been organized without a grant of salt springs. In some of the States the grant was of all within their boundaries, but on the admission of Missouri, and since, the number was limited to twelve. This number, with a certain quantity of contiguous lands, were granted to Nebraska on her admission.

In doing this Congress must have assumed that the springs had been reserved from sale, for if this had not been done the presumption is there would have been nothing for the grant to operate upon. It may be true that lands only fit for agriculture will remain a long time unentered, but this would never be the case with lands whose surface was covered over with salt. It would be an idle thing to make a grant of such lands, if there had been a previous right of entry conceded to individuals. This was in the mind of Congress, and induced the reservation in the act of 1854, by means of which Nebraska could be placed on an equal footing with other States in like situation.

But it is said the locations in question are ratified by the proviso to the section granting the salt springs. This proviso was as follows: "Provided that no salt spring or lands, *the right whereof is now vested in any individual* or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State." This provision, with an unimportant change in phraseology, was first introduced into the enabling act for Missouri, 3 Stat. at Large, 547, § 6, and exactly similar provisions with the one in question were inserted in the acts relating to Arkansas and Kansas, 5 Id. 58; 12 Id. 126. The real purpose of the proviso is to be found in the situation of the country embraced in the Louisiana purchase. The treaty of Paris, of April 30, 1803, by which the "province of Louisiana" was acquired, stipulated for the protection of private property. This comprehended titles which were complete as well as those awaiting completion (*Soulard v. United States*, 4 Peters, 511) and Congress adopted the appropriate means for ascertaining and confirming them. They were numerous and of various grades, and covered town sites and every species of lands. In Missouri, as the records of this court show, they were quite extensive, and when she was admitted into the Union many of these titles were perfect, and still a large number imperfect. In this condition of things Congress thought proper in granting the salt springs to the State to say that no salt springs, *the right whereof now is* or shall be confirmed or adjudged to any individual, shall pass under the grant to the State. Whether this legislation was necessary to

save salt springs claimed under the French treaty it is not important to determine, but manifestly it had this purpose in view and nothing more. It could not refer to salt springs not thus claimed, because all entry upon them was unlawful, on account of previous reservation. It speaks of confirmations which had been made and those which were awaiting governmental action, and in this condition were all the titles the United States were bound to protect.

Although the words employed in the first division of the proviso to the saline grant to Nebraska are not the same as those used in the Missouri grant, they mean the same thing. There can be no difference between a right which has been confirmed and one which is now vested. Both are perfect in themselves, and refer to completed claims, while the last division in each proviso has reference to claims in course of completion but not finally passed upon. This proviso can have little significance in the enabling act of Nebraska, nor indeed in many other enabling acts, but Congress doubtless thought proper to introduce it out of the superabundance of caution, as there could be no certainty that in purchased or conquered territory, however remote from settlement, there might not be private claims protected by treaty stipulations to which it would be applicable. It can not be invoked, however, for the protection of these plaintiffs. When a vested right is spoken of in a statute, it means a right lawfully vested, and this excludes the locations in question, for they were made on lands reserved from sale or entry. If Congress had intended to ratify invalid entries like these, they would have used the language of ratification. Instead of doing this, the language actually employed negatives any idea that Congress intended to give validity to any unauthorized location on the public lands.

The Pre-emption Act of the 4th of September, 1841, 5 Stat. at Large, 456, declares that "no lands on which are situated *any known* salines or mines shall be liable to entry;" differing in this respect from the acts of 1796 and 1854, which reserve every "salt spring" and "salines." The salines in this case were not hidden as mines often are, but were so incrustated with salt that they resembled "snow-covered lakes," and were consequently not subject to pre-emption. Can it be supposed that a privilege denied to pre-emptors in Nebraska was conceded in the act of 1864 to persons less meritorious? It appears by

the record that on the survey of the Nebraska country the salines in question were noted on the field-books, but these notes were not transmitted to the registers' general plats, and it is argued that the failure to do this gave a right of entry. But not so, for the words of the statute are general and reserve from sale or location *all* salines, whether marked on the plats or not.

What effect the statute might have on salines hidden in the earth, not known to the surveyor or the locator, but discovered after entry, may become a question in another case. It does not arise in this. Here, the salines were not only noted on the field-books but were palpable to the eye. Besides this, the locators of the warrants, before they made their entries, were told of the character of the lands. Indeed, it is quite clear that the lands were entered solely on account of the rich deposits of salt which they were supposed to contain.

It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void: *Polk v. Wendal*, 9 Cranch, 99; *Minter v. Crommelin*, 18 Howard, 88; *Reichart v. Felps*, 6 Wallace, 160. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law: *Minter v. Crommelin*, *supra*.

Judgment affirmed.

1. The occupancy of public lands gives no vested right therein as against the United States or its grantees: *Sparks v. Pierce*, 115 U. S. 408.

2. Congress has absolute authority over the public domain. The authority conferred on the president by Congress to lease the lead mines ceases with the expiration of the time prescribed: *U. S. v. Gratiot*, 14 Pet. 520.

3. Parol sale of improvements on the public domain is not within the Statute of Frauds: *Zickafosse v. Hulick*, 1 Morris, 175, 39 Am. Dec. 458.

4. The government, as a land owner, offers its mineral lands for sale upon certain prescribed conditions which are matters between owner and purchaser, and with which no stranger to the title can interfere: *Wight v. Dubois*, 21 Fed. 693; 4 West C. R., 153.

See APPROPRIATION, LOCATION, POSSESSION.

KEELER V. GREEN ET AL.

(21 New Jersey Eq., 27. Court of Chancery, 1870.)

¹ **Face of quarry necessarily irregular.** A stipulation in a lease of a quarry of a horse shoe shape, and having faces on the northwest, north, east and southeast sides "that said quarry shall be worked as the face is now opened," is not violated by quarrying one of the faces to a greater extent than another, and such quarrying will not be enjoined if the same general shape is preserved.

² **"Inconvenience"** does not amount to "obstruction" in a covenant concerning the deposit of quarry refuse.

A general license to dump quarry strippings on adjoining land is deemed a continuing license until revoked.

On motion to dissolve injunction upon coming in of the answer.

Mr. A. REED, in support of the motion.

Mr. G. D. W. VROOM and Mr. E. T. GREEN, *contra*.

THE CHANCELLOR.

The injunction restrains the defendants from further opening the face of a quarry adjoining the feeder of the Delaware and Raritan Canal, leased to them by the complainant, beyond the face as opened at the time of the lease, and from depositing the stripping of the quarry over the northwesterly face, or within, on the interior or bottom of the quarry, or on the farm of the complainant northwest of the quarry.

The complainant had demised this quarry to the defendants for three years from January 1, 1868, by a lease under seal, at the rent of \$11,000 for the term, with a right of renewal for two years at a stipulated rent. The lease provided that the lessees should have the right to use thirty men in taking out stone, but no more, except at a stipulated increase of rent for each additional man.

¹ *Fellows v. Webb*, 43 Iowa, 183.

² *Abson v. Fenton*, 15 M. R. —.

It contained also these stipulations: "That said quarry shall be worked as the face is now opened, following the good merchantable stone as deep as such stone shall run, and in good quarrying shape, and so far as the water will drain with the pipes laid therein."

"That the stripping shall be deposited, the first year of the term, south of the feeder, along the bank of the same, on land of said Keeler, or in any other place designated by said Keeler opposite said quarry not exceeding that distance; and after the first year the stripping shall be deposited within the quarry wherever it can be done without obstructing the future working of the same or covering the face thereof; and if this can not be done, it shall be deposited as above stipulated for the first year of the term."

The bill alleges that the defendants were not working the quarry as the face was opened at the time of making the lease, and failed to follow up the good merchantable stone as deep as they run in good quarrying shape, and as far as the water will drain, and that they were stripping and working far to the south of the face as opened at the making of the lease. No other specification is given of the manner in which this stipulation is violated.

The answer fully denies this charge, positively and clearly, in as definite and particular terms as it was made; first negatively, and then by affirming that the quarry had been worked in the precise manner provided in the lease, with the exception of six stones on the bottom, which had not yet been removed, but which the defendants intend to remove.

What the complainant intended to charge as the violation of this specification can not be ascertained from the pleadings, but from an expression in one of the affidavits annexed to the bill and from the position taken by counsel in the argument, I infer that the complaint is that the quarry was not worked, and stone taken out to an equal extent from the face on every side. The quarry, at the date of the lease, had been opened and worked in a horse-shoe shape, and its faces were on the northwest, north, and east and southeast sides. The charge which I infer is, that it was worked mainly and to the greatest extent on the southeast side and not so much, if at all, on the northwest. In the first place the answer fully and without evasion denies the breach of agreement as particularly as it is

alleged in the bill; and in the second place, had the bill charged that the quarry was worked on one side more than the other, and the fact been admitted by the answer, the agreement does not appear to me to prohibit it. It only compels the defendants to work as the face was then opened, but does not oblige them to work every part of the face to the same extent. If they should take out fifty feet from one part of the face and only ten feet from another, it is no breach of this agreement provided they took out all the merchantable stone to the depth indicated, and left the face in good quarrying shape, which I must take to mean with a fair, even surface, and not with jagged recesses. This is not opening a new face to the quarry, but simply working it from its old face as required by the lease. The face left after taking out stone to the extent of fifty feet would not be in the same place or constituted by the same stone as the old one, but it is the same face in the sense in which that term is used in this lease. And the defendants have the right to remove the earth above the stone on the southeast side of the quarry, called in this lease the strippings, in order to get out the stone extending from that face to the southeast. So far as the injunction restrains the opening a new face to the quarry it must be dissolved; not because the defendants have a right to open a new face, but because what they have done and propose doing is not opening a new face.

The injunction also restrains them from depositing the strippings on the interior or bottom of the quarry. The bill alleges that the defendants have deposited strippings inside of the quarry to the height of thirty feet, and have thereby covered good merchantable stone to the depth of four or five feet, and have obstructed the ingress to and egress from the quarry, and have covered the face of the quarry in some places, and have thus injured the future working of the quarry. The answer admits the deposit of strippings on the bottom of the quarry, but denies that there is any merchantable stone covered by it, or that the access to the quarry is at all injured by it, and alleges that the roads existing at the time of the lease are now open to a greater extent than they then were; and it denies that the face of the quarry is anywhere covered by strippings, except at the northwest side where some strippings deposited on the adjoining land of the complainant, by his consent, slid

down in the quarry and covered part of its face. And the defendants aver that they do not intend to deposit any more strippings on that part of the complainant's farm.

The face of the quarry in this lease clearly means the perpendicular sides as opened and not the bottom of the quarry, a term used in contradistinction to the face, and in a different sense. The deposit was required to be made on the bottom unless it could not be made without obstructing the working of the quarry or covering the face. If there were good merchantable stone in the bottom which could be quarried to advantage, they ought not to be covered up. But the answer responsively denies that there are any; it responsively denies that the access to the quarry is obstructed by the deposit. This answer is not new matter. But the deposition read to contradict it, if it could be admitted, only says that the deposit impedes the ingress and egress, not that it obstructs it; any deposit would prevent passing over the spot where it was made, but if sufficient room was provided to pass in and out of the quarry, the access is not *obstructed*; which word does not include "made a little more inconvenient." The answer responsively denies anything that would be a breach of the agreement as to these deposits.

The strippings which were deposited on the northwest side of the quarry over its face, whether by accidentally sliding down or by being intentionally dumped there, were put there in breach of the agreement, and to that extent the injunction must be retained.

As to the deposit on the complainant's farm, adjoining the quarry on the northwest side, the answer states that this was done with the permission of the complainant; this, though new matter, is not denied by the complainant in his subsequent deposition. He only says that during the first year he gave such license, and did not afterward give any license. He does not say that he revoked the license or that he limited it when he gave it to the first year, but that it was given some time in the first year. Such license would be deemed a continuing license until revoked, and as it nowhere appears that the defendants intended or threatened to continue depositing after the license is revoked, and as they deny that they intend to continue it, this appears no proper ground for injunction.

The injunction must be dissolved, except so much as prohibits the depositing of strippings on or over the northwest face of the quarry.

The costs must abide the event of the suit.

1. The distinctions between mines and quarries stated: *Darrill v. Roper*, 10 M. R. 406; *Clereland v. Meyrick*, 37 L. J. Ch. 779; *Brown v. Chadwick*, 7 Irish C. L. 101; *Listoncell v. Gibbings*, 9 Irish C. L. 223; *Hedley v. Fenwick*, 3 H. & C. 348; *Midgley v. Richardson*, 14 M. & W. 595; *Rex v. Sedgley*, 10 M. R. 390; *Bell v. Wilson*, 10 M. R. 415; *Rex v. Brettell*, 3 B. & Ad. 424; *Rex v. Dunsford*, 2 Ad. & El. 568.

2. Whether a mine or a quarry is a question of fact: *Rex v. Dunsford*, 2 Ad. & El. 568.

3. Grant of right to quarry does not carry the right to exclusive possession: *Snell v. Walsatch Ry.*, 1 West C. R. 631.

4. Wrongful quarrying of rock by lessee of agricultural lands: *Freer v. Stotenbur*, 2 Abb. App. (N. Y.) 189.

5. Reservation of minerals held to include free-stone to be got only by underground mining: *Bell v. Wilson*, 10 M. R. 415. Reservation of mines held not to extend to quarries: *Brown v. Chadwick*, 7 Irish C. L. 101.

6. Right conferred in lease to quarry granite, does not confer right to rubble stone: *Emery v. Otings*, 8 M. R. 378.

7. Grant of the right of common in quarries: *Green v. Putnam*, 8 Cush. 21.

8. Landlord having been accustomed to work quarries for sale, sub-let part of the lands, and lessees undertook to quarry and sell rock. Held, that he would be enjoined: *Mansfield v. Crawford*, 9 Irish Eq. 271. There is no analogy between open quarries and mines: *Id.*

HEAD V. FORDYCE ET AL.

(17 California, 149. Supreme Court, 1860.)

¹ A bill to quiet title will lie in favor of the possessor of a ditch against one claiming title by virtue of the sale of the same, upon proceedings under the mechanic's lien act, alleged by the plaintiff to be illegal, aside from any question of fraud.

What amounts to cloud. A decree alleged to be supported by a lien elder to plaintiff's title, is a cloud upon such title.

Any description of claim may be the subject of a cloud on title, and is relievable by bill to set it aside.

General rule as to the right to bring the action. Plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property.

Necessity of *lis pendens*. Under the California statute, the mere pendency of a suit does not charge the purchaser of the subject of it as a purchaser *pendente lite* at common law. To have that effect a notice of *lis pendens* must be filed or appear of record.

Burden of proof on plaintiff—Insufficient findings. A plaintiff seeking to set aside a decree foreclosing a lien as a cloud upon his title, must show affirmatively that defendant had no claim on the property, and if the findings are insufficient for the court to determine whether the defendant had any lien, the judgment in favor of plaintiff will be reversed that the cause may be fully tried.

Appeal from the Fifth District.

The facts appear in the opinion of the court. The suit was against Fordyce and the Volcano Water and Mining Company. The court below held that Fordyce had no lien on the property, and that his decree for a lien was a fraud upon plaintiff and constituted a cloud upon his title; and therefore annulled and set aside said decree so as to remove the cloud. Defendant Fordyce appeals.

ROBINSON, BEATTY & HEACOCK, for appellant.

JOHN ARMSTRONG, for respondent.

BALDWIN, J., delivered the opinion of the court, FIELD, C. J., concurring.

¹ *Milligan v. Sareny*, 9 Pac. 894; *Goldsmith v. Gilliland*, 22 Fed. 758; *Pralus v. Jefferson Co.*, 12 M. R. 473.

This was a bill filed by the respondent, asserting title to a certain ditch in his possession, and praying that a pretended claim to it on the part of appellant, defendant below, may be declared invalid. This claim, the bill asserts, is fraudulent and void as against the plaintiff. The bill charges that Fordyce commenced an action against the Volcano Water and Mining Company for a large sum of money, to subject to sale the ditch of that name, including aqueducts, flumes, culverts, dams, water gates, cabins and appurtenances, in enforcement of a certain lien alleged by him to be taken and held against this property by virtue of the act of April 9, 1856, in reference to mechanics' liens. Subsequently a sale was made of this property under judgment in favor of one Harris against the Volcano company. This property was sold, and purchased by one Siger; and Head, the plaintiff below, regularly redeemed it by force of a judgment rendered after this judgment of Harris, and in due course received a sheriff's deed for the premises, which was recorded. That afterward, and when the Volcano company had no interest in the property, the defendant Fordyce recovered judgment in the suit first stated; that one Rose, the president of the company, colluding with and being interested in the claim of Fordyce, procured or suffered this judgment in the Fordyce suit for the sum of \$8,000, which judgment directed the sale and foreclosure of the property to satisfy the judgment and enforce the lien therein declared. The bill asserts that the company were not indebted in this sum, and that the plaintiff had no lien on the property for this amount. The bill also charges that Rose had no authority from the company to agree to judgment in the proceedings before set out; that Fordyce is about enforcing the decree of foreclosure, and that it is a cloud upon the plaintiff's title.

The answer denies the fraud and collusion, and the finding of the judge below is that this charge in the bill was unfounded in this respect.

Two main questions are made: 1. Whether this bill will lie. 2. Whether the defendant, Fordyce, has any claim under his judgment to enforce his lien, as against the plaintiff in this action.

Apart from any charges of fraud, it would seem that the existence of a decree founded upon proceedings taken prior

to the title of the plaintiff, and seeking to condemn the property by virtue of an asserted lien older than plaintiff's title, would be a cloud upon that title. The statute giving this right of action to the party in possession does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretension. The plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property.

2. There is no force in the point that the bill does not aver that plaintiff had no notice of these proceedings of Fordyce at the time of the purchase under the Harris judgment. Such notice is not presumed. Under our statute, the mere pendency of a suit does not charge the purchaser of the subject of it as a purchaser *pendente lite* at common law. A notice of *lis pendens*, to have that effect, must be filed or appear of record; and there is no pretense that this was done. This point, however, is not very important; for it seems to be assumed by the parties that the contract of Fordyce, relied on as giving him a lien on the property, was filed and recorded in pursuance of the Lien Law of Mechanics, etc., of 1856; and if Fordyce acquired by this contract and its registry a lien, the judgment of Harris and the sale under it would not affect the lien. We do not find in the record the contract set out from which this lien is claimed. Among the findings is the statement that Fordyce filed his bill *claiming* that the property before described was subject to his lien, and praying and obtaining an enforcement of the lien; but the contract is not set out, nor is there any finding of the facts recited in it; nor is it shown that it was recorded; nor are there any other facts stated in connection with the subject; nor does it appear that the record of the suit of Fordyce was introduced in proof.

The plaintiff, in seeking to set aside this decree as a cloud upon his title to the property, must show affirmatively that

Fordyce had no claim on the property, or any right to subject it or any part of it. It seems that the property is described as a ditch, with aqueducts, flumes, cabins, reservoirs, etc. No particular description is given of the aqueducts, or the flumes, the cabins, etc., their value, etc.; nor of the value of the materials furnished for the building of the flumes, cabins, etc.; nor that the plaintiff's claim was solely for furnishing materials for building the cabins, flumes, etc.

The findings, therefore, are insufficient to enable us to pass on the question whether Fordyce has any lien on the cabins, aqueducts, flumes, etc. It is enough for the disposition of this case at present to say that it is not shown that the decree of Fordyce is invalid as against the plaintiff's judgment. Whether a flume is a "superstructure," within the meaning of the statute of 1856, 203, or whether it is so under the circumstances of this case, we are unwilling to decide in advance of a case distinctly presenting the facts.

The judgment is reversed, and the cause remanded, that it may be fully tried, and such amendments of the pleadings may be had as the parties desire.

Ordered accordingly.

PRALUS ET AL. V. JEFFERSON G. & S. M. Co.

(34 California, 558. Supreme Court, 1868.)

¹ Possession of claim necessary to maintain action. In order to maintain an action under the Practice Act, § 254, to quiet title to a mining claim upon the public domain, the plaintiff must establish his possession, either actual or constructive, at the time of the commencement of the action, and a complaint which fails to aver such possession is demurrable.

Prospect holes do not amount to actual possession.

Constructive possession under district rules. There can be no constructive possession of mining claims upon the public domain, except under district rules. To establish such constructive possession there must be proof that there are such rules in force in the particular district, what the requirements of the rules are, and that they have been complied with.

Findings, how corrected. If the findings of the court are defective in omitting to find a material fact, the party aggrieved should move to correct them; and if any fact is found contrary to the evidence, it should be specified in a motion for new trial.

¹ *Head v. Fordyce*, 12 M. R. 470.

Appeal from the District Court, Tenth Judicial District, Yuba County.

The plaintiffs appealed.

The other facts are stated in the opinion of the court.

F. J. McCANN and J. O. GOODWIN, for appellants.

G. N. SWEZY and CHAS. E. FILKINS, for respondent.

By the Court, CROCKETT, J.

This is an action founded on section two hundred and fifty-four of the Practice Act, to quiet the plaintiffs' title to a piece of mining ground in Yuba county. The complaint avers, among other things, that at the commencement of the action the plaintiffs were in possession of the mining ground in contest. This was a material and traversable allegation, which it was incumbent on the plaintiffs to prove, if denied. Without that averment the complaint would have been demurrable: *Ritchie v. Dorland*, 6 Cal. 33; *Curtis v. Sutter*, 15 Cal. 259; *San Francisco v. Beideman*, 17 Cal. 443; *Van Winkle v. Hinckle*, 21 Cal. 343; *Rico v. Spence*, 21 Cal. 504; *Lyle v. Rollins*, 25 Cal. 437.

The answer explicitly denies the possession of the plaintiffs, and avers, on the contrary, that the defendant and the grantors of defendant "have been in the quiet, peaceable and undisturbed possession of said mining ground for the last six years and more, and have held and worked the same in accordance with the mining rules and regulations of said Brown's Valley Mining District."

The findings on the question of possession are, in substance, that in September, 1862, the plaintiffs made their location of one thousand feet, set stakes upon the ledge at the north and south ends and commenced work; that no notices were put up on the ground, but in the same month a notice of their claim was filed in the county recorder's office; that in the latter part of 1862 the plaintiffs performed work on the ledge to the value of sixty or eighty dollars, in prospecting the ledge and sinking holes along the line of it, and in November or

December, 1863, a shaft was sunk to the depth of twenty-five feet, and in the spring of 1864 some further work was done; that in 1853 Reed & Frierson, under whom the defendant claims, laid claim to a portion of the ledge now claimed by defendant; that in 1855 one Rule entered upon that portion of the ledge then known as the Jefferson claim, as a tenant of Reed's interest, under a lease from him, and did some work upon the claim. The court then finds as follows:

"There are but two methods by which to prove possession of a mining claim, to enable a party to maintain an action for it: First, by showing an actual possession; and this would doubtless be sufficient with or without mining laws; but the possession must be actual. In this case neither party pretends to show such a possession beyond the three or four feet square upon which prospect holes were dug. This would defeat plaintiffs' action if a recovery was sought upon that right. Second, by a constructive possession under the rules or regulations of miners. Such a possession the defendants did have for years prior to the location of the plaintiffs."

The findings contain nothing more on the question of the actual possession of either the plaintiffs or defendant at the commencement of the action.

We construe the findings to declare distinctly that neither the plaintiffs nor defendant ever had the actual possession at any time; and certainly the court does not find that the plaintiffs, at the commencement of the action, had either the actual or constructive possession.

The plaintiff's counsel made an unsuccessful effort to correct the findings in some particulars, but not in those relating to the question of the possession of the plaintiffs.

The plaintiffs also moved for a new trial on the ground, amongst others, that the evidence was insufficient to support the decision of the court, and specifies several particulars wherein it is alleged to be insufficient. But none of them have any reference to the question of the actual possession of the plaintiffs at the commencement of the action.

The court below, upon the findings, entered judgment for the defendant, and under these circumstances we must assume that the plaintiffs failed to establish an actual possession at the time of the commencement of the action.

This must of itself be decisive of this action, unless it can be maintained on a constructive possession, and unless the plaintiffs established such constructive possession. If such possession would avail the plaintiffs in this form of action, it was incumbent on them to establish it as an affirmative fact. Do the findings establish in the plaintiffs the constructive possession at the commencement of the action? We think not. On the contrary, the court distinctly finds that the defendant had the constructive possession for years "prior to the location of the plaintiffs," and no fact is contained in the findings from which it can be inferred that the plaintiffs, at the commencement of the action, had such constructive possession, unless the facts found establish the existence of local mining laws in that district, and that the plaintiffs or their predecessors in interest complied with them, and that the ground was liable to appropriation for mining purposes. There can be no constructive possession of mining ground on the public domain unless it be from a compliance with the local mining customs, laws and regulations.

All that is revealed to us by the findings in respect to mining rules and regulations in that district is, that as early as 1852 regular semi-annual meetings of the miners of Brown's Valley were held, at which laws were passed for the holding of claims and the regulation of the mines, and in 1855 the semi-annual meetings were changed to annual meetings; that a law of 1853 required each claim to be represented at the regular meetings, either by the owners or by attorney, or it might be declared forfeited; that another law required each claim to be recorded at the regular meetings, and that from the books put in evidence, the practice must have been not to make a record of the description of the mine, but to record under the claim the names of the parties, whether owner or attorney, who represented the claim; that there was no law or custom requiring claims to be recorded in the office of the county recorder. The findings are entirely silent as to the method which the mining laws or customs prescribed for locating, working or defining the boundaries of claims, or the extent of the claims which one or more persons might locate. In the absence of light on these subjects it is impossible to say whether or not the plaintiffs located their claim

in accordance with those laws or customs, and as the plaintiffs hold the affirmative of the issue it was incumbent on them, in order to establish a constructive possession, to prove not only what acts were required to be done under the mining laws or customs to locate and hold a claim, but also to show a compliance on their part with these requirements. This they have failed to do, so far as the findings exhibit the facts.

If the findings were defective in omitting to find a material fact on this branch of the case, the plaintiffs, at the proper time and in the proper manner, should have moved to correct them. But there was no motion to correct them in this particular. If the court found any fact in respect to the mining laws, and the action of the plaintiffs under them, contrary to the evidence, the plaintiffs should have specified it on their motion for a new trial. But there were no such specifications. On the contrary, all the specifications related to acts done by the defendant and its grantors.

Our conclusions, therefore, are: First—That in order to maintain an action of this character in respect to a mining claim on the public domain, the plaintiff must establish at least a constructive possession at the time of the commencement of the action. Second—That such constructive possession can only be established by the proof of three facts: 1. That there were local mining customs, rules and regulations in force in that particular district. 2. What particular acts were required by such mining laws or customs to be performed in the location and working of claims, and the extent of each claim as authorized by such laws. 3. That the plaintiffs have substantially complied with these requirements.

The plaintiffs having failed to show either an actual or constructive possession of the ground in contest at the time of the commencement of the action, judgment was properly rendered for the defendant.

Under our view of the case, it is unnecessary to decide the other points presented in the record.

Judgment affirmed.

PRALUS ET AL. V. THE PACIFIC G. & S. M. CO.

(35 California, 30. Supreme Court, 1868.)

¹ **A possessory title is sufficient** to maintain an action to quiet title to a claim upon the public domain.

Idem—Sufficient averment of injury. In such action an averment that plaintiffs were greatly embarrassed in the enjoyment of their mining claim and their interest therein greatly depreciated by reason of the possibility of there being title in the defendant as he falsely asserted, is a sufficient averment of injury under the statute, to sustain the action.

Sufficient findings of fact. A general finding by the court that "all the allegations and averments in plaintiffs' complaint are true, and that all in the answer are untrue," is sufficient and conclusive of all the material issues made by the pleadings.

Abandonment after action brought—Findings. In an action to quiet title to a mining claim, if a supplemental answer sets up an abandonment of the claim by plaintiffs since suit commenced, but fails to allege any subsequently acquired rights in defendant, such matters, if true, will not avail as a defense; and the failure of the court to make a special finding of fact thereon is immaterial.

Record as evidence of custom to record claims. Where the plaintiffs' title to a quartz mining claim depended upon an alleged custom to record quartz claims in the office of the recorder of the county, the record from such office is admissible to show the fact of plaintiffs' claim having been recorded, and as tending to prove the existence of the custom.

Record of location—Original notice. The county record of a notice of location, though taken from a draft on paper, may be, by custom, the original notice of the location of a mining claim.

Depositions in narrative form. An objection to a deposition under the California statute, that it is taken in narrative form, instead of question and answer, will not be sustained.

Single certificate to depositions of several witnesses. When the depositions of two or more witnesses are taken in behalf of the same party, under the same notice, at the same time and place, and before the same officer, a single certificate appended at the close of all the depositions on the same paper, or on several sheets securely attached together, if in proper form, may cover each and all.

Findings not disturbed. Findings will not be disturbed if the statement on motion for new trial entirely fails to specify the particulars wherein the evidence is insufficient to justify, or contrary to, the findings.

Appeal from the District Court, Tenth Judicial District, Yuba County.

¹ *Aspen M. Co. v. Rucker*, 28 Fed. 220.

² *Sullivan v. Hense*, 9 M. R. 487.

The trial of this cause was by the court, without a jury. The pleadings on the part of the defendant, a corporation, consisted of the answer and a supplemental answer; the latter setting up as defenses the matters stated in the opinion of the court, while the former put in issue all the averments of the complaint, except that the defendant made claim of title to the disputed premises, and alleged that at the commencement of the action, and continuously thereafter, it had been in possession of the same.

On the trial, plaintiffs, for the purposes stated in the opinion of the court, introduced in evidence, under the objections and exceptions of defendant on the ground of irrelevancy, incompetency, and that, being secondary evidence, no foundation had been laid for its introduction—the contents of forty-six pages of a book kept in the office of the county recorder of Yuba county, called “Pre-emption Book No. 2,” which consisted of a record of the notices of location of divers quartz mining claims, the first of which in the order of record, was the notice of location of plaintiffs’ claims. It appeared that the record of plaintiffs’ notice, which was a true copy, was made from an original draft shown to be still in existence, but not produced or its absence accounted for.

The evidence for the plaintiffs consisted, in part, of the depositions of John Richards and James Pearce, mentioned in the opinion of the court, which were introduced in evidence under the objections and exceptions of defendant, on the grounds that they were not taken by question and answer, and were not properly certified to. The facts concerning said depositions were as indicated in the opinion of the court.

The only specifications contained in appellant’s statement on motion for a new trial, as to the insufficiency of the evidence to support the findings, were the following:

“Seventh—That the court erred in each and every of its findings of facts, as each, every, and all of them are contrary to the evidence, in that there is no evidence to support them.

“Eighth—That each and every of the findings of the court are unsupported by the pleadings, and are contrary to law

“Ninth—That the evidence is insufficient to support the findings.

“Tenth—That the findings are not responsive to the issues

made by the pleadings, and are insufficient, defective, uncertain and general.

"Eleventh—That the findings are contrary to the evidence, in that the evidence showed that the defendants were, at the time of the commencement of the suit, and long before then, and ever since have been, the owners of and in the possession of the ground in dispute; and that the plaintiffs never had been and were not in possession of the same at the commencement of suit, and have not since been.

"Twelfth—That the findings are contrary to the evidence, in that the evidence was sufficient, and was uncontradicted, to support every allegation contained in the defendant's supplemental answer."

The plaintiffs had judgment in the court below, from which and from an order denying their motion for a new trial the defendant appealed.

The other material facts are stated in the opinion of the court.

G. N. SWEZY and C. E. FILKINS, for appellant.

F. J. McCANN and J. O. GOODWIN, for respondents.

By the Court, SPRAGUE, J.

This action was brought under the two hundred and fifty-fourth section of our Practice Act, to quiet title to a quartz mining claim upon the public lands. The plaintiffs, as appears by the complaint, claim only a possessory title in or upon the public lands of the United States, and the first question presented is, whether such a claim or title is sufficient to authorize an action by the party in possession under the same to determine the adverse title or claim of a party out of possession. This has been frequently decided by this court in the affirmative, and we think correctly: *Mer. ed Co. v. Fremont*, 7 Cal. 319; *Smith v. Brannan*, 13 Cal. 107; *Boggs v. Merced Co.*, 14 Cal. 279; *Curtis v. Sutter*, 15 Cal. 259; *Head v. Fordyce*, 17 Cal. 149.

The allegation in the complaint, "that by means of the false representations and pretenses aforesaid of the said defendant

(referring to the alleged adverse claim of defendant), they are greatly embarrassed in the free enjoyment, use and disposition of their said described mining claim * * * and that the interest of these complainants in said mining claim * * * is greatly depreciated by reason of the possibility of title in this defendant, resulting from and growing out of said false and pretended claims," is sufficient averment of injury under the statute, resulting from such adverse claim, to sustain the action.

The special findings of fact by the court, as found in the record, cover the material issues in the case, and the general finding that "all the allegations and averments in plaintiffs' complaint are true, and that all in the answer are untrue," is sufficient, and conclusive of all the issues made by the pleadings: *McEwen v. Johnson*, 7 Cal. 260; *Breeze v. Doyle*, 19 Cal. 101. But it is contended that the fourth (general) finding, "that all the allegations and averments in plaintiffs' complaint are true, and that all in the answer of defendants are untrue," does not cover the issues tendered by the supplemental answer, and that there is an entire absence of any finding upon such issues. The only issues tendered by the supplemental answer are abandonment and forfeiture by plaintiffs of the premises in controversy since the commencement of the suit by virtue of the mining laws of the district.

Pending a controversy in court involving the right to the possession of the premises as between plaintiffs and defendant, the plea of abandonment or forfeiture tendered by defendant might well have been disregarded by the court, especially in the absence of any allegation of subsequently acquired rights in the premises by defendant.

A simple abandonment or forfeiture by plaintiffs could not inure to the especial benefit of defendant. But the first special finding of the court is conclusive upon the issue of abandonment by plaintiffs. It is as follows: That on or about the 8th day of September, 1862, the plaintiffs above named and their grantors, located the six hundred feet upon and along a certain quartz ledge or lode known as Brown's Valley or Pennsylvania Ledge or Lode, situated at Brown's Valley, Yuba county, measured off and appropriated the same for mining purposes, and immediately entered into the

possession and enjoyment thereof, and have ever since been in the peaceable and quiet possession of said mining claim, so as aforesaid located, appropriated and held by plaintiffs.” * * * And this finding embraces all the tendered issues in the supplemental answer, except that of forfeiture of plaintiffs’ right of possession, by reason of failure to perform the labor required by the rules of the district *pendente lite*, and this question under the former pleadings and facts, as specifically found, we regard as entirely immaterial in this case, as defendant does not allege any subsequent appropriation of the premises, or newly acquired right therein.

The point that error was committed by the court in admitting in evidence Pre-emption Book No. 2, Yuba County, is not well taken. The object and purpose for which this evidence appears to have been offered was to establish the fact that plaintiffs had caused a record to be made of the location of their quartz mining claim in the recorder’s office of Yuba county, and to furnish evidence tending to establish a custom of the district to record quartz claims at the county recorder’s office.

Plaintiffs were seeking to establish that, at the time when their quartz claim was alleged to have been located, it was the custom of the Brown’s Valley Quartz Mining District for persons desiring to locate and appropriate a quartz claim to measure off and designate the boundaries of such claim by stakes on the ground, enter upon the same, and cause a record of such location to be made in the county recorder’s office. Had the record been offered as evidence of the contents of a separate, independent, original notice, it would have been incompetent, whether the loss of such original had been established or not.

Such custom sought to be established by this book would make the entry found therein the original notice, not a record or copy of an independent original.

The objections to the depositions of Richards and Pearce are not tenable. We see no objection, under our statute, to taking a deposition in a narrative form, instead of question and answer. In this case defendant, though having due notice of the time and place of taking the depositions of witnesses Richards and Pearce, did not appear. The caption

of the depositions, after the title of the cause, is as follows: "Depositions of John Richards and James Pearce, witnesses, taken in above case, * * * on the part of plaintiff, pursuant to notice and affidavit hereto annexed, at the time and place therein mentioned." There is but one caption and one certificate to both depositions, nor is it necessary, when the depositions of two or more witnesses are taken in behalf of the same party, under the same notice, at the same time and place and before the same officer, that a formal certificate of the officer should be appended to the deposition of each witness. In such case one certificate appended at the close of all the depositions on the same paper, or on several sheets of paper securely attached together, if in proper form, may cover each and all.

The statement on motion for a new trial entirely fails to "specify the particulars" wherein the evidence is insufficient to justify or contrary to the finding, except as to the issue of possession of the mining claims in controversy, and upon this point the evidence is substantially conflicting; hence the finding should not be disturbed by this court: *Lyle v. Rollins*, 25 Cal. 440; *Ellis v. Jeans*, 26 Cal. 273; *Doe v. Vallejo*, 29 Cal. 385; *Rice v. Cunningham*, 29 Cal. 495.

Jgment and order denying new trial affirmed.

ROSS V. HEINTZEN.

(36 California, 313. Supreme Court, 1868.)

¹ **Tenant in common against co-tenant.** One tenant in common of a mining claim, in actual possession, may maintain an action, under the Practice Act, to determine the validity of an adverse title purchased by a co-tenant.

Vendor's lien not transferable. The equitable lien held by the vendor of real estate, after absolute conveyance thereof, is not subject to levy and sale on execution, nor is it the subject of private transfer.

Idem—The purchase money attachable. The debt of unpaid purchase money may be levied upon or transferred; but the equitable interest that attaches to the property conveyed by virtue of the indebtedness in hands of the vendor, is extinguished by a transfer of the indebtedness.

¹ *Leary v. Duff*, 137 Mass. 147.

Facts of the case—Sale of co-tenant's interest—Partnership debts. A mine and mill were owned and worked in partnership by M. and S., who held two thirds, and C. and Y., who held the other third; M. and S. conveyed by deed their two-thirds interest to plaintiff, who at once took their place as co-tenant in possession, but paid only a small part of the purchase price. At the date of such conveyance the company was indebted, and upon such indebtedness judgment was obtained against all the original owners, and in due course their entire interest in the property was sold to the defendant by sheriff's deed. *Held*, in an action to quiet title brought by the grantee of M. and S. that he had acquired their original two-thirds interest, and that the vendee at sheriff's sale acquired thereby only the one-third interest of C. and Y.

Appeal from the District Court, Tenth Judicial District, Sierra County.

The facts are stated in the opinion of the court.

G. N. SWEZY, for appellant.

VAN CLIEF & COWDEN, for respondent.

By the Court, SPRAGUE, J.

This action was brought under the two hundred and fifty-fourth section of the Practice Act. The complaint alleges title and possession in plaintiff, of an undivided two thirds of certain described real estate, and that defendant unlawfully and wrongfully claims an estate or interest in the same two thirds adverse to plaintiff; and prays that the adverse claim of defendant may be determined and adjudged void, and that plaintiff's right and title thereto may be declared and adjudged good and valid. The answer of defendant denies the alleged title and possession of plaintiff, and alleges title and possession in defendant of the entire premises described in the complaint, and that the title, share, or interest of plaintiff, if any, is subject to the title and right of defendant, and prays for judgment decreeing plaintiff's right or interest, if any, subject and inferior to the right of defendant.

The court, upon the trial of the issues thus framed, finds substantially the following facts:

As early as 1863 certain persons were the owners of a

quartz ledge and mill in Sierra county, and were engaged in the business of mining upon the ledge under the associate name of the American Hill Quartz Company. The memberships of this company were changed from time to time by sale and purchase, but the work of mining upon the ledge was continuously prosecuted under the same associate name until the 27th of August, 1866. No particular agreement appears to have been ever entered into between the several owners, as to the relation they should bear to each other or to the property held by them; but the mine and mill were acquired for the sole purpose of extracting the gold from the quartz, and with certain other property necessary in working the mine were brought into and held by the association as its capital. By a tacit understanding the profits and losses resulting from working the mine were shared by the members of the company in proportion to their respective interests.

From the 29th of April, 1865, until the 27th of August, 1866, Henry Molineux, Hiram Southworth, S. M. Cutler and James Young were the owners of the mine, mill and appurtenances, and together prosecuted the business of mining in connection with the same in the company name; Molineux and Southworth together owning two thirds of the whole property, and Cutler and Young one third.

On the 27th of August, 1866, Molineux and Southworth sold and conveyed their interest of two thirds to plaintiff, Ross. The deed of conveyance was duly executed and acknowledged, and on the day of its date was recorded in the appropriate book of records of Sierra county.

At the time of the execution of this deed the work of the company was suspended, and has not since been resumed.

When this deed was made the company was indebted in from twelve to fifteen thousand dollars, and Ross had notice of the indebtedness.

On the 14th of September, 1866, the defendant, Heintzen, commenced an action in the District Court of Sierra County against Molineux, Southworth, Cutler, Young, and Ross, averring in his complaint that the defendants were partners in the working and managing of the American Hill quartz ledge; that they were associated under the firm name of the American Hill Quartz Mining Company, and for several years

prior to the filing of the complaint, had mined upon said quartz ledge, extracting the gold therefrom, buying supplies, materials, etc., and in every respect had acted and been mining copartners in said business; that in the management of said co-partnership business, and between the first day of October, 1864, and the thirteenth day of September, 1866, the said company became indebted to various persons, for labor and material furnished at the instance of the company, in a sum amounting in the aggregate to eleven thousand three hundred and forty-two dollars and fourteen cents, which had been assigned to plaintiff, and for which judgment was asked.

At the time of commencing this action the plaintiff regularly took an attachment and caused it to be levied, among other things, upon all the right, title and interest of the defendants in and to all the property which is the subject of this action.

To the complaint thus filed Ross answered, denying that he was then or ever was a partner with the other defendants named in the working or managing the American Hill quartz ledge, or that he was then or ever was associated with the other defendants under any firm name whatever, in mining on said ledge, or in buying supplies or materials therefor, or that he had ever acted or been a mining copartner with the other defendants at the time of the accruing of any of the indebtedness mentioned.

The other defendants suffered default.

The case was tried by the court, and on the 26th of October, 1866, after reciting that it appeared to the court that Ross was not a member of said company at the time the several items of indebtedness named in plaintiff's complaint accrued, judgment was rendered in his favor and against all the other defendants, for the amount claimed. On this judgment execution was taken out on the 31st of October, 1866, and levied on all the right, title, and interest of the judgment debtors, Molineux, Southworth, Cutler, and Young, in and to all the property attached, and after due advertisement the same was sold by the sheriff on the 24th of November, 1866, to Heintzer, the judgment creditor, for the full amount of his judgment. No redemption having been made, on the 27th day of May, 1867, the sheriff made and delivered to the purchaser,

Heintzen, a deed conveying to him all the right, title, and interest of the judgment debtors in and to the property.

From the 24th day of May, 1867, up to and at the time of the commencement of the present action, the plaintiff, Ross, was in the actual possession of the property described in the complaint, but the defendant, Heintzen, was not in the actual possession thereof.

At the trial of the present action, no evidence was offered as to whether the indebtedness upon which Heintzen recovered his judgment of the 26th of October, 1866, was or was not a just indebtedness against the defendants in that action; nor as to the consideration for which Molineux and Southworth sold to Ross, except that recited in their deed to Ross, which is seven thousand dollars in hand paid, the receipt whereof is acknowledged, and also the further consideration "that the said John Ross hath by contract of this date (date of the deed), agreed to pay to us a further sum of twenty thousand dollars in the proportion that the said property" in said deed described, and by it conveyed, was, before the execution of said deed, owned by said Molineux and Southworth, "whenever, and as soon as from time to time said Ross shall have received the same from the property, after payment of all current expenses thereof." Nor was there any evidence as to whether, on the 7th day of August, 1866, or at any subsequent time, Molineux, Southworth, Cutler, or Young was insolvent or otherwise.

Both parties claim to derive title to the two undivided thirds of the property described in the plaintiff's complaint from Molineux and Southworth—the plaintiff by his said deed of August 27, 1866, and the defendant by his said sheriff's deed of May 27, 1867.

Upon the foregoing facts judgment and decree was entered against defendant, Heintzen, and in favor of plaintiff, Ross, in accordance with the prayer of the complaint. Defendant appeals from the judgment. The issues presented by the pleadings involve but two simple questions—first, as between plaintiff and defendant, which has the legal title to the undivided two thirds claimed by plaintiff of the premises described in the complaint; and second, was the plaintiff in the actual possession at the time of the commencement of this suit. No

equitable title to or interest in the undivided two thirds is alleged or claimed by the defendant in his answer; nor does the answer allege any specific or equitable lien upon the same; hence, the questions so ably discussed by counsel of the respective parties as to whether the defendant, as a creditor of the American Hill Quartz Mining Company, on the 27th of August, 1866, held or possessed an equitable lien upon the premises as the company property of his debtors, or whether by his attachment of all the right, title, and interest of Molineux, Southworth, Cutler and Young, in and to the same on the 14th of September, 1866, his subsequent judgment, execution, levy, purchase at sheriff's sale and sheriff's deed of all the right, title and interest of the said several persons therein, he acquired a vendor's lien then held by Molineux and Southworth upon the undivided two thirds, theretofore conveyed by them to Ross, are not involved in the issues made or tendered by the pleadings.

Nor does the record disclose that defendant or any other party through whom he derives title to any portion of the premises, has ever established or enforced, or in any manner attempted to establish or enforce any equitable lien upon the undivided two thirds conveyed by Molineux and Southworth to plaintiff on the 27th of August, 1866.

It appears from the record that on and for more than one year prior to the 27th of August, 1866, the legal title to the mine, mill and appurtenances described in the complaint was vested in four persons—Molineux, Southworth, Cutler and Young. Molineux and Southworth jointly owning and holding the legal title to an undivided two thirds thereof, and Cutler and Young jointly owning and holding the legal title to the other undivided one third.

Whatever equities may have existed in these joint owners or tenants in common of the premises, as between themselves, affecting the title and interest of each co-tenant, by virtue of the partnership business which they had been prosecuting upon and in connection with the premises, could not have been adjusted, enforced or properly inquired into in this action for want of necessary parties and proper allegations in the pleadings.

The deed of Molineux and Southworth to Ross, of the 27th

August, 1886, vested in him the legal title theretofore held by them of an undivided two thirds of the premises, and transferred to him all their right, title and interest in the premises; and after this transfer, Molineux and Southworth had no title nor interest in any portion of the premises subject to levy and sale on execution. Hence, the subsequent levy, sale on execution, and purchase at such execution sale by, and sheriff's deed to, Heintzen, of all the right, title and interest in the premises held by Molineux, Southworth, Cutler and Young, on the 14th of September, 1866, vested in Heintzen the legal title to an undivided one third only—the same being the legal title and interest then held by Cutler and Young: *Williams v. Young*, 17 Cal. 406.

And admitting the position claimed by appellant—which the record fails to establish—that on and prior to the 27th of August, 1866, the mine, mill and appurtenances were the partnership property of the American Hill Quartz Mining Company, composed of the four persons, Molineux, Southworth, Cutler and Young—the legal title to one undivided two thirds thereof being vested in Molineux and Southworth, and the legal title to an undivided one third of the same being vested in Cutler and Young for the use and benefit of the firm, and that, as such partnership property, each member of the firm held and possessed an equitable lien upon the premises as security for any such sum or amount as might be found due him from the firm on final settlement of the partnership affairs and payment of partnership debts, then the deed of Molineux and Southworth of the twenty-seventh August, vested in Ross the legal title to an undivided two thirds of the premises incumbered with this contingent equitable lien of the other partners, Cutler and Young, which by them, or through them by creditors of the firm, by proper proceedings in equity, was liable to be ascertained, established and enforced. It does not appear from the record in this case that Cutler and Young, or either of them, or any creditor of the firm through or independent of them, had ever by any proper proceeding, established, or attempted to establish or enforce, any such lien upon the undivided two thirds so held by Ross. Nor does it appear but that Molineux and Southworth transferred their two-thirds interest in the premises to Ross, with the full consent of Cutler

and Young, after such an adjustment and settlement of the partnership affairs and interests between the members of the firm as entirely relieved the two thirds so transferred from any equitable lien of the partners retaining the remaining one third; or but that, at the date of such transfer, and at the date of Heintzen's attachment and judgment, the members of the company against whom the judgment was obtained held other and sufficient property subject to levy on execution to have satisfied the judgment.

There is nothing in the record from which it appears or can be inferred that Heintzen ever acquired the interests of Molineux and Southworth in the contract or agreement of Ross, executed to them for deferred payments of a portion of the purchase price of their two-thirds interest in the premises; that agreement, as evidence of indebtedness to Molineux and Southworth, might have been reached and applied in satisfaction of Heintzen's judgment by proceedings supplementary to execution; or if, during the life of an attachment or execution in the hands of the sheriff, the indebtedness of Ross to them had matured, the amount due them from Ross might have been levied upon by proper garnishment of Ross. But, if either or all these steps had been taken by Heintzen, Ross' title to and interest in the premises in controversy would not thereby have been affected. The equitable lien held by a vendor of real estate, after absolute conveyance thereof, is not subject to levy and sale on execution, nor is it the subject of private transfer: *Baum v. Grigsby*, 21 Cal. 172; *Lewis v. Covillaud*, 21 Cal. 178; *Williams v. Young*, 21 Cal. 227. The indebtedness for purchase price of real estate may be levied upon or transferred, but the equitable lien which attaches to the land by virtue of the indebtedness in the hands of the vendor, is extinguished by a transfer of the indebtedness.

As appears by the record, then, Ross is the absolute owner of and holds the legal title to an undivided two thirds of the premises described in the complaint, and, as found by the court below, was in the actual possession thereof at the time of the commencement of this suit, and Heintzen is the owner of and holds the legal title to only one undivided third of the same premises, and was not in the actual possession thereof at the commencement of this action. And we can

discover no valid reason why one tenant in common of real estate, in the actual possession thereof, may not maintain an action under the two hundred and fifty-fourth section of the Practice Act, to determine the validity of an adverse claim of title by a co-tenant, and no authority has been called to our notice which sustains a contrary view.

Judgment affirmed.

Mr. Justice CROCKETT delivered the following concurring opinion, in which Mr. Chief Justice SAWYER concurred:

We concur in the judgment on the ground that the plaintiff acquired the legal title to the property before the defendant attempted to reach it by his attachment; and if the defendant, by means of his judgment, execution, sale and sheriff's deed, acquired any title as against the plaintiff, it was only an equity, to be enforced by appropriate proceedings in a court of equity, and there were no such proceedings in this case.

STEWART'S APPEAL.

(78 Pennsylvania State, 88. Supreme Court, 1875.)

¹ **Discretion to cancel instrument.** A chancellor will not always order an instrument to be delivered up to be canceled when he would refuse specific performance of the contract; he may leave the parties to their legal remedies. To decree an instrument to be delivered up to be canceled is a matter in the sound discretion of the court, and the power should not be exercised except in a very clear case.

² **Instrument capable of being used to vex title.** Whenever an instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach it has been lost, or which may throw a cloud over the title, and he can not immediately protect his right by any proceedings at law, equity will afford relief by directing the instrument to be delivered up to be canceled, or such other decree as justice or the rights of the party may require.

Appeal from the Court of Common Pleas of Luzerne County.

¹ *Brainerd v. Arnold*, 8 M. R. 478.

² *Chaffee v. Detroit*, 53 Mich. 573.

The bill in this case was filed November 2, 1865, by Franklin Stewart and others, against Wilson Ayer, Charles A. Lane, Elisha B. Harvey and others. It set out:

1. Betsey Stewart in her life was seized in fee of a tract of land in Luzerne county, containing about 285 acres, inherited from her father, Lazarus Stewart, deceased, and allotted to her by proceedings in partition of his estate; and also by inheritance from her sister, Martha Stewart, of the undivided sixth part of another tract of 285 acres, inherited by Martha from her father, the same Lazarus Stewart, and allotted to her by the same proceedings in partition; Betsey Stewart, being so seized, was afterward married to Alexander Jameson, and about August 20, 1806, died intestate, leaving her husband, Alexander Jameson, to survive her. He died about the 17th of February, 1859. The plaintiffs were the children and grandchildren and heirs of Jameson and his wife, Betsey.

2. Recorded in the office for recording deeds, in Luzerne county, there was a paper purporting to be a lease made by Alexander Jameson to Charles A. Lane, one of the defendants, of a tract of land in Luzerne county, containing 400 acres, part of which was the land above mentioned, belonging to Betsey Stewart; said paper having been recorded on the 12th of January, 1864, upon the proof of the execution, by Elisha B. Harvey, one of the defendants, and a subscribing witness to it; the same paper was recorded in the same office on the 22d of September, 1856, and in the lifetime of Jameson, upon the acknowledgment of Lane alone, no attempt having ever been made to procure Jameson's acknowledgment to it.

3. E. B. Harvey, a defendant, and subscribing witness to the lease, was interested in it.

4. A number of assignments of the lease to the defendants had been made, the first being from Lane to Ayer, dated May 17, 1855, the consideration being \$55,000—subsequent assignments being for undivided interests; the last was to Edward B. Peat for an undivided fourth. The plaintiffs averred that the considerations mentioned in the assignments were fictitious, and that each of the assignees of the lease had notice before the respective assignments that the lessee and his family had declared that his lease was fraudulent and void.

5. The lease was void by weakness of understanding in the lessee and fraud in obtaining it, the lessee being at the time aged eighty-eight years, and his mind so weakened as to be unable to comprehend the purport of the paper, etc., and Harvey and Lane imposed upon him, and kept him in ignorance of the true effect of the paper.

6, 7, 8, 9. The lease was void from want of power in the lessee to make it, he being but tenant by curtesy, and there being no mines opened in his lifetime; also by reason of his death; for want of consideration; by reason of interlineations; erasures were made by the parties interested since its execution, the lease having always been in the possession of defendants, and by reason of uncertainty.

10. The signature of Jameson was obtained after the day of its date; its existence was concealed from his family. Other reasons averring fraud and that the lease was void were set out.

11. The existence of the lease on the record and in the possession and control of the defendants worked injury to the plaintiff's rights, and prevented their making an advantageous sale of the land, etc.

The prayers were:

1. That the lease might be declared void.
2. That it might be decreed to be delivered up to be canceled.
3. General relief.

The lease to Lane was dated December 21, 1852; it authorized mining coal on the land for eighteen years, "to be reckoned from the taking of coal from said lot." The rent was to be eight cents per ton for the coal mined. Lane was to surrender the premises at the end of eighteen years, with the right to renew the lease for eight years more.

The plaintiffs are devisees under the will of Alexander Jameson, dated January 3, 1852, and proved March 8, 1860.

The answer denied the substantial allegations of the bill as to the invalidity, etc., of the lease, etc.

Replication being filed, Alexander Farnham, Esq., was appointed examiner and master.

He took a large amount of evidence as examiner. As master he made an elaborate and exhaustive report on the facts and law of the case, and reported his conclusions, viz:

"In conclusion, I report these two propositions to be established by the evidence—the other propositions, as advanced by the plaintiffs and hereinbefore stated, not being established.

"1. That at the time of the execution of the lease in question to Charles A. Lane, Alexander Jameson was a tenant by curtesy of an undivided portion of the lands embraced in said lease, and no mines being opened thereon the lease is therefore void; it is void, moreover, by reason of his death.

"2. That at the time of the execution of the said lease, Alexander Jameson was, by reason of weakness of mental understanding, incompetent and unable to make contracts understandingly, and that the lease is therefore void."

Exceptions were filed to the report. The questions raised in the case do not require a statement of the finding of the master of the facts, further than appears by the foregoing statement and the opinion of the court as delivered by Elwell, P. J., of the Twenty-sixth District.

"The bill of the complainants charges that a mining lease made by Alexander Jameson to Charles A. Lane, dated 21st December, 1852, is void as a lease, and of no validity as an incumbrance on the land therein described, and prays that it may be delivered up to be canceled. The complainants are devisees of Alexander Jameson, who died in 1859; they are also heirs of Betsey Jameson, wife of Alexander Jameson, who died in 1806. They allege that, although the legal title to the whole tract described in the lease was vested in Alexander Jameson by the certificate of the commissioners appointed under the acts of 1799 and 1802, he, nevertheless, was trustee of his wife as to two undivided third parts thereof, and as to those parts, at the time of executing the lease in question, he was merely tenant by the curtesy.

"It is alleged that the lease is void:

"1. Because of want of power on the part of the lessor to bind the heirs of his wife by an instrument operating after his death.

"2. Because the lessor was incompetent, by reason of mental weakness, to contract.

"3. Because the lease was procured by fraud and undue influence.

"4. Because of alteration in the lease made since its execution.

" 5. Because of uncertainty as to the time when the term commenced ; and,

" 6. Because there was no consideration to support the contract.

" These several allegations are denied in the answers of the defendants, who aver that they are *bona fide* purchasers of the interest of the lessee, and, as such, are entitled to hold as against any secret trust of which they had not notice. They also aver that possession was taken under the lease, and the contract, therefore, completely executed.

" The able and exhaustive report of the master negatives the charge of fraud in procuring the lease, and also that of alteration since its execution, and concludes, as matter of law, that the contract is not void for uncertainty nor want of consideration. But the two propositions above stated, of want of power and absence of mental capacity are affirmed by the master.

" The case is so plainly stated in the report of the master as to render unnecessary the introduction of the facts into this opinion."

After discussing the question as to Alexander Jameson's holding the title in his own right, the opinion proceeded :

" But there are other matters to be considered in connection with the right of the claimants to a cancellation of the contract. They hold, even according to their own claim, an undivided portion of the land under the will of Alexander Jameson, dated January 3, 1852, before the execution of the lease, and proved in 1860, after the death of the testator. By the terms of the will all of the land embraced in the certificate and in the lease was devised, and has been held accordingly by the complainants. Whatever interest may have come to them by descent from Betsey Jameson has not been recognized and acted upon as distinct from, or independent of the title devised under the will of Alexander Jameson.

" In the lease the words 'to farm let and demise,' imply a covenant against any title paramount to the lessor: 1 Wash. Real Prop. 427. The effect of which also is that he has a good title, and can give a free, unincumbered lease for the time demised: *Id.*, 428. For the purpose of this part of the case, Alexander Jameson must be presumed to have known

what his title was. He would not have been heard in a court of equity, asserting that he had made a lease for a greater interest than he possessed, and praying for relief by cancellation of his contract. The complainants represent his title, and therefore stand upon no higher ground than he did. If the lease is a cloud upon their title, it was created by their testator; and although their acceptance under the will might not prevent their claiming rights descending to them from their maternal ancestor, yet the lease should have existence to enable the lessee to recover damages for the breach of covenant, if any such breach has occurred. I can not concur in the conclusion that the lease is void for want of power on the part of the lessor. The objection to its validity on the ground of uncertainty as to the commencement of the term, is fully answered in the reasons given and authorities cited by the master. It was to begin "when coal was taken" by the lessee. It is a mistaken construction of this contract to hold that it gave to the lessees an unlimited time in which to commence taking coal. As no time was specified, the law presumes that the parties intended and agreed that it should be done in a reasonable time: *Ellis v. Thompson*, 3 M. & W. 445; 2 Pars. Con., 47. * * *

"But if an instrument is void on its face it carries its own condemnation with it, and is not in any legal sense a cloud upon the title which requires the interference of a court of equity; *Hotchkiss v. Elting*, 36 Barb. 45.

"The same principle applies to the allegation of want of consideration. Even if it were well founded there would be no occasion for equitable interferences. But the agreement to pay eight cents per ton for all coal mined, is a sufficient consideration to support even an unsealed instrument. Under this lease the lessees were bound, by at least an implied obligation, not only to *commence* mining coal within a reasonable time, but also to carry on and prosecute mining to a reasonable extent, all of the circumstances considered; and this they were bound to do, under the penalty of either damages or forfeiture, or both. * * *

"It is evident, from the whole tenor of the evidence, that the intellect of Mr. Jameson was impaired by age; that his memory had failed to a considerable extent; that in conversing

upon matters of the present time he would frequently intermingle transactions long past; that he sometimes forgot in regard to agreements to make purchases; that he would frequently do the same thing over again, and also ask the same questions repeatedly; that it had become difficult for him to compute accounts and count money. In addition to this, a number of witnesses gave it as their opinion that from 1850 to 1853, and afterward to the time of his death, he was unfit to do business.

"On the other hand, the testimony of the subscribing witness to the lease, a member of the bar, whose character has not been attacked, as well as that of the lessee, who was called upon other points by the complainants, proves facts which establish competency to understand and comprehend the contract on the part of the lessor. It would seem that he was familiar with coal leases, having before executed them to other parties. In addition to the testimony of the persons present at the execution of the lease, it appears that in January, 1852, he executed a will under which the complainants divided his estate, and still hold title. * * * I am not satisfied that Alexander Jameson, on the 21st December, 1852, was wholly incapacitated to transact business. If the lease had been in law subject to the construction contended for by the complainants, I would have no hesitancy in holding that advantage had been taken of the mental weakness of the old man, and would presume fraud. If the lessees might begin to mine when they pleased, at any remote, indefinite period, and thereafter might limit their mining to one ton a year, the contract would be so one-sided and unfair as to justify the interference of equity. But, construed according to the rule before stated, considering the probable amount of money necessary to be expended before profit could be received, the lease was a fair contract, and the consideration not so inadequate as to suggest fraud in obtaining it. * * *

"So, in the case under consideration, the circumstances are such as forbid a decree for specific performance. In addition to the old age and mental weakness of the lessor, is the further fact that the lessee, for about four years after the date of the lease, did nothing whatever under it. In May, 1855, he assigned it to Wilson Ager. Ager assigned to Stephen Pierce

in July, 1856. Some time in 1856, Ager sent a person upon the premises to take possession. This person began to dig, and having made a hole about ten feet square, and perhaps the same depth, he quit work, upon the service of a summons in trespass upon him at the suit of Jameson. No declaration was ever filed in the case, and no further entry upon the premises, or attempt to mine coal, has been made to this day.

"In 1857 Stephen Pierce re-assigned one half to Wilson Ager and one fourth to Abraham Edwards. These three fourths are now held by B. S. Russell, John K. Grotz and Alphens Peet, each one fourth, as collateral security for indebtedness of their respective assignees.

"These assignees of Lane stand upon no higher ground than he occupied. First, because the doctrine in regard to the protection of *bona fide* purchasers does not apply to lessees of land where actual and full possession has not been taken under the lease; and second, because after the lapse of *four* years from the date of the lease, without the commencement of operations, the original lessee had no rights which he could enforce. His assignees were put upon inquiry by the facts surrounding the case, and must be presumed to have notice both of the delinquencies and of the reasons which would prevent specific performance.

"The bill in equity, instituted by the complainants in 1860, affords the defendants no excuse for the delay in performing the contract. No injunction was at any time served upon them. If they had desired to assert their rights (I speak now of the lessee and early assignees) it was incumbent upon them to show themselves ready, prompt and eager to perform their part of the contract.

"And so in regard to the complainants. If they desired the aid of a court of equity they ought to have applied for it and pursued their remedy at an earlier day, instead of waiting thirteen years after the date of the lease, eleven years after they had knowledge of its existence, and six years after the death of the lessor. They abandoned their bill, filed in 1860, and when they filed the present bill in 1865, had no occasion to ask for protection at the hands of the court. From the time of obtaining the lease to filing of this bill, neither the lessee nor his assigns have made any substantial attempt at

performance. The entry that was made in 1856 or 1857, was too late to entitle the lessee to assert rights under the lease. And besides, the abandonment of possession, because an action of trespass was brought, and the continued omission to commence operations according to the implied requirements of the contract, amounted at the time of the filing of this bill, to an abandonment of all claims under it. The complainants, therefore, had no grounds, or at least no occasion to institute these proceedings, and their bill must, therefore, be dismissed. But the facts being such as show that the defendants are now setting up a claim which they can not sustain, following the precedent of *Graham v. Pancoast*, we dismiss the bill, but refuse costs to either party."

A decree was entered in accordance with the opinion.

The plaintiffs appealed to the Supreme Court, and assigned for error the decree dismissing their bill.

A. RICKETTS, for appellants.

M. F. ELLIOTT and H. B. WRIGHT (with whom was C. A. BUCKALEW), for appellees.

Mr. Justice SHARSWOOD delivered the opinion of the court, May 10, 1875.

Upon every point on which the mining lease of December 21, 1852, by Alexander Jameson to Charles A. Lane, was attacked in the bill, the decision of the learned judge below was adverse to the appellants. Want of power in the lessor, incompetency by reason of mental weakness, fraud and undue influence, alteration in the instrument, uncertainty as to the commencement of the term and want of consideration, are all considered and disposed of, and we think rightly disposed of. There is a clear distinction, well established as a rule in equity, between cases of specific performance and of rescission or cancellation. In many instances the chancellor will refuse specific performance where he will also refuse to order the instrument to be delivered up to be canceled, but leave the parties to their legal remedies: *Graham v. Pancoast*, 6 Casey, 89. This case would certainly present itself in a different light,

were it a bill by the appellee, praying specific performance and to be put into possession under the lease. The learned judge below expressed the opinion, not only from the unusual stipulations of the lease, and the great age and mental weakness of the lessor, but also from the lapse of time without any possession taken or operations commenced under the lease, the appellant had no ground to apprehend any successful assertion of the rights of the lessee or his assignees.

It is contended, however, that admitting this to be so, the existence of the lease outstanding in the assignee, was a cloud upon the title of the appellants, preventing their sale of the property, and that a decree should have been made upon that ground of equity. Mr. Justice Strong said, very truly, in *Kennedy v. Kennedy*, 7 Wright, 417, "there are very many cases analogous to bills of peace, in which a chancellor has interfered to quiet the enjoyment of a right, or to establish it by a decree, or to remove a cloud from the title. Indeed, this is one of the well-recognized branches of equitable jurisdiction, though its extent is not clearly defined." It has been maintained that an instrument wholly void upon its face would carry its own condemnation with it, and would not be, in a proper and legal sense, a cloud upon the title: *Hotchkiss v. Elting*, 36 Barb. 45, and cases there cited. Mr. Justice Story considers it to be now fully established, that in such cases courts of equity will not interpose their authority to order a cancellation or delivery up of such instruments: 2 Story Eq. Jur., 700. Chancellor Kent, however, in *Hamilton v. Cummings*, 1 Johns. Ch. 522, after an exhaustive examination of the English precedents, says: "I am inclined to think that the weight of authority and the reason of the thing are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law, and whether it be void from matter appearing on its face or from proof taken in the cause, and that these assumed distinctions are not well founded." He adds: "Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not

arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation." The best expression of the rule, as it seems to me, is to be found in an opinion of the Supreme Court of Massachusetts, in *Martin v. Grave*, 5 Allen, 601, by Merrick, J.: "Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he can not immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice or the rights of the parties may require." It is certainly a matter in the sound discretion of the court, in view of all the circumstances of the case, and the power ought not to be exercised except in a very clear case. We think this is not such a case. To exercise it here would be in effect to overrule the well-settled principle of chancery which has already been adverted to, and say that whenever a chancellor, on account of the laches of the adverse claimant, or the unreasonableness of the contract, or the mental weakness of the party, would decline to enforce the contract by a specific performance, he will order it to be delivered up to be canceled when it may operate to cloud the title. The lessees or their assignees ought not to be deprived of their legal remedies, and their constitutional right of trial by jury, as they would be by such a decree.

Decree affirmed and appeal dismissed, each party to pay his own costs of this appeal.

THE SCORPION SILVER MINING CO. v. MARSANO.

(10 Nevada, 370. Supreme Court, 1875.)

¹ Possession got by force—Nevada practice. Possession is not essential to enable the plaintiff to recover in an action to remove a cloud upon his title; and under the Practice Act, Sec. 256, the right of action to quiet title is given to any one in possession, so that in either case the objection that plaintiff obtained possession *vi et armis* can not be inquired into.

Defendant must plead and prove his title. In an action to quiet title under the statute, it is not necessary for the plaintiff to set out specifically the character of the adverse claim; the burden is on the defendant, if he admits plaintiff's possession, or does not disclaim, to plead and prove a good title in himself.

Constructive service of summons. A party relying solely upon a constructive service of summons is bound to prove a strict compliance with some of the modes prescribed by the statute for obtaining such service.

Service of summons on business manager. Where the officer certifies that he served the summons upon the business manager of a corporation: *Held*, not a compliance with the provisions of the statute requiring the service to be upon the managing agent.

Idem. Courts must know, and officers must be presumed to know, what the legislature meant by the term "managing agent"; but courts can not know what an officer means by a designation unknown to the law.

Justice's docket no evidence of service. The docket of a justice of the peace is only primary evidence of those facts which it is required to contain, and as it is not required to contain a finding that summons was served, the service can not be proved by it.

Publication of summons—Deposit in postoffice. Where a party relies upon the publication of summons, it is necessary not only to publish a copy, but to deposit another copy in the postoffice, directed to the defendant at his place of residence, if known; and the statute prescribes that such deposit shall be proved by affidavit.

Deposit in postoffice must be addressed to the defendant. In a suit brought against the Scorpion Silver Mining Company, a corporation, where the justice of the peace deposited a copy of the complaint and summons in the postoffice, addressed to "Robert Apple or W. H. Martin, San Francisco, California," and there was no evidence at the time of such deposit, before the justice, that either Apple or Martin was connected with the corporation in any capacity whatever: *Held*, not a compliance with the law, which required the summons to be directed to the defendant.

¹ As to effect of forcible dispossession, see *St. Louis R'y v. Drcees*, 23 Fed. 519, 691; *Fuhr v. Dean*, 6 M. R. 216; *Lorimier v. Lewis*, 12 M. R. 437; *Miller v. Taylor*, 9 M. R. 547.

Appeal from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

DELONG & BELKNAP and CHARLES H. BRYAN, for appellant.

MESICK & SEELY, for respondent.

By the Court, BEATTY, J.

The complaint in this action is verified, and contains the following allegations: That the plaintiff is a California corporation; that it is the owner and in the actual and exclusive possession of certain mining ground situated in Storey county; that defendant claims an estate in the premises adverse to the plaintiff; that his claim is based solely upon the proceedings in a certain action in a justice's court of Virginia City, brought by the defendant Marsano against the corporation, plaintiff in this action; that these proceedings (which are recited in the complaint) cast a cloud upon plaintiff's title; that the defendant has no estate in the premises, and his claim thereto is inequitable for the reason (among others) that the judgment under which he claims, and consequently the execution, levy, sale and constable's deed made in pursuance of it, are void for want of jurisdiction of the person of the defendant in the action.

The complaint concludes with the following prayer: "Wherefore, plaintiff prays that said defendant herein may be required to answer this complaint and set forth and show to this court upon what and how he claims an estate in said mining claim and premises, and thereupon that the said defendant be adjudged to have no estate in the same, and that his claim thereof is invalid, and that the said deed and proceedings aforesaid are a cloud upon plaintiff's title to said premises, and that the same be removed," and for general relief.

The defendant, in his answer, denies that plaintiff is a corporation, but admits its possession of the premises, and that he claims an estate therein adverse to the plaintiff, based upon the proceedings had in the action in the justice's court. These proceedings he sets forth at large, showing the attempts made by the justice of the peace to obtain jurisdiction of the

person of the defendant, the judgment by default, execution, levy, sale and constable's deed. He further alleges that he remained in peaceable possession of the premises, under his deed, from April to December, 1874, expending labor and money in the development and improvement of the property, and that he was then forcibly ejected by the plaintiff. He prays to be adjudged the owner of the premises, for costs and general relief.

Upon these pleadings the parties went to trial. The plaintiff proved its incorporation, read the complaint and answer, and rested its case. The defendant moved for a nonsuit, which motion was overruled. The defendant then put in evidence his deed, and the papers and proceedings in the case of *Marsano v. The Scorpion S. M. Co.*, in pursuance of which it was executed. In addition to these papers he offered certain oral testimony for the purpose of showing service of the summons in that case, and testimony to prove that he went into possession of the premises in controversy under his constable's deed, worked upon them, and was so engaged when he was forcibly ejected by plaintiff's servants.

Upon this testimony the case was submitted to the court. Findings were filed in favor of plaintiff, and judgment entered accordingly. The defendant moved for other and additional findings and for a new trial, which motions were overruled; and he takes this appeal from the judgment and the order overruling his motion for a new trial.

In support of his appeal the defendant argues that the plaintiff ought not to be allowed to maintain this action, because it obtained the possession of the premises upon which it relies by illegal means, that is, *vi et armis*. But we think this objection can not be maintained, for if this is an action to remove a cloud upon the title of the plaintiff, possession of the premises is not essential to enable the plaintiff to recover; and if it is an action brought in pursuance of the provisions of section 256 of the Practice Act, the mode of acquiring possession is of no consequence. The statute gives the right of action to any person in possession, irrespective of the mode by which possession has been acquired. We are not authorized to create exceptions, or impose limitations which the statute does not recognize, and can perceive no good end to be sub-

served by doing so, even if we had the power. The following cases are cited in support of this view: 32 Cal. 109; 45 Id. 519; 26 Id. 314. As to other suggestions made in this connection, on the argument, we believe it is not seriously contended that an estoppel has been either pleaded or proved, and certainly none has been.

The next point relied upon by the appellant is, that the court erred in overruling his motion for a nonsuit, and he relies upon the authority of *Blasdel v. Williams*, 9 Nev. 161, in support of his position. In the written argument filed by counsel for respondent they take no notice of this point, or of the case referred to in support of it. On the oral argument, if we remember rightly, they took the position that this case was essentially unlike that of *Blasdel v. Williams*, and that the points there decided have no application here. But after mature consideration we are unable to discriminate the two cases, and if the decision of *Blasdel v. Williams* is law, we do not perceive how this judgment can be sustained. The leading principle laid down in that case, and from which the point decided is a mere deduction, is expressed in the following language: "A defendant in an ordinary suit is not to be brought into court except upon a cause of action against him; that cause, under the statute here in question" (section 256 of the Civil Practice Act), "is the assertion of a claim to real property prejudicial to the plaintiff. Certainly it devolves upon the plaintiff to show such assertion and its prejudicial effect, *which can alone follow from a claim in semblance valid, in reality void.*" That is to say, under the statute, as before it and independent of it, in a suit to remove a cloud upon title, it is essential that the plaintiff shall plead and prove a claim by defendant which has the semblance of validity, *prima facie*, but is in reality void by reason of extrinsic facts, which must likewise be pleaded and proved by the plaintiff, even though this should involve the necessity of proving a negative. Now, if this is the law, we say again that we do not perceive how this judgment can be sustained; for if the complaint shows that the claim of defendant is invalid at all, it shows that it is void absolutely and upon its face. And if the answer shows anything in addition to this, it shows that the claim of defendant, though apparently

invalid, is in reality good; so that when the plaintiff rested on the pleadings, it had pleaded and proved itself out of court, and no testimony was offered by the defendant on his part which had the slightest tendency to mend the plaintiff's case. It results, therefore, that we are under the necessity of deciding whether we will adhere to the rule of *Blasdel v. Williams* or abandon it, and we must express our regret that the views entertained of this case by counsel for respondent force us to make the decision without the benefit of a re-argument of the important questions involved. We regret this the more because the investigation which we have been able to make for ourselves has forced us to the conclusion that the decision referred to is not only unsustained by satisfactory reasons, but is opposed to the overwhelming weight of authority, and is not law. It is our opinion that under a proper construction of this statute it is not necessary for the plaintiff to set out specifically the character of the adverse claim, and that the burden is upon the defendant, if he admits plaintiff's possession, or does not disclaim, to plead and prove a good title in himself. This conclusion disposes of a variety of points made by appellant as to the insufficiency of the pleadings and proofs on the part of the plaintiff, and brings us to the principal and only remaining question in the case:

Did the defendant plead and prove a good title to the premises?

His title is the constable's deed, and its validity depends upon the validity of the judgment of the justice of the peace in the action of Marsano against the Scorpion S. M. Co. That judgment is void if the justice of the peace had no jurisdiction of the person of the defendant, and it must be found that he had no such jurisdiction unless it is affirmatively shown that there was an actual or constructive service of the summons: See *Mallett v. Uncle Sam Co.*, 1 Nev. 198. It is not claimed that there was any actual service, and the defendant, relying solely upon a constructive service, was bound to prove a strict compliance with some one of the modes prescribed by the statute for obtaining constructive service. Did he do so? In deciding this question, we concede for the sake of the argument (but without determining the point) that where the docket and papers on file in a case do not show the facts nec-

essary to confer jurisdiction, they may be aided by proof *aliunde*; for, taking all the testimony offered by defendant, and giving it the most ample effect, it does not prove any substantial, and much less a liberal compliance with the statute in the attempted service of the summons. The original summons in the action was issued July 22, 1873, and made returnable July 31, at 10 o'clock A. M. The only evidence of service of this summons offered or relied upon by the defendant was, 1st, the constable's return, together with an attempt to prove that the person named in the return was the managing agent of the corporation; and 2d, an entry in the justice's docket. The constable's return, which was indorsed on the original summons, reads as follows:

"I hereby certify that I have served the within summons by delivering a true copy thereof to Thomas Brooks, *business manager* of Scorpion Company, in Virginia City, at the county of Storey, this 23d day of July, A. D. 1873.

"J. D. BALDWIN, Constable."

The only testimony offered by the defendant as to the agency of Brooks was the following certificate:

"VIRGINIA CITY, July 19, 1873.

"This is to certify that Mr. Marsano has worked thirty-eight (38) days for the Scorpion M. Co., at \$4.00 per day—\$152.00.

"ROBERT APPLE, Superintendent,
"By T. Brooks."

The statute makes the delivery of a copy of the summons to the "*managing agent*" of a foreign corporation service upon the corporation, but it does not mention "*business manager*" of a corporation in that connection. It is contended, however, that "business manager" and "managing agent" mean the same thing, and to name the one is to name the other, and consequently that the return of the officer by itself shows a service by delivery of copy of summons to the "managing agent" of the defendant. If this is not admitted, it is further contended that the certificate signed by Brooks for Apple shows that he was in fact the managing agent of the corporation.

But we can not assent to either proposition. The certificate

above quoted, so far from tending to prove that Brooks was managing agent of the Scorpion S. M. Co., has a directly opposite tendency. It proves that Apple was such agent and that Brooks was his subordinate, having authority merely to sign his name. And if we disregard the certificate altogether, the constable's return—considered as unimpaired, as it certainly is unaided, by the other testimony—does not show a service by delivery to the *managing agent*. Courts must know, and constables must be presumed to know, what the legislature means by the term *managing agent*, but we can not know what a constable means by a designation unknown to the law; and if we are to indulge in any presumptions on the subject, we ought to presume that the officer did not write "business manager" by mistake, while intending to write *managing agent*, but that he did so advisedly and *ex industria*, because he knew that Brooks was not the person meant by the statute. This disposes of the constable's return. The entry in the justice's docket relied on to prove a service reads as follows: "Summons served on Thos. Brooks, business manager, etc., of defendant at the city of Virginia, July 23, 1873," etc. This entry proves nothing. The docket of the justice is only primary evidence of those facts which it is required to contain, and it is not required to contain any finding that summons has been served; it is only required to contain the date of the summons and the time of its return. See Pr. Act, Sec. 562, and 15 Cal. 300.

There was, then, no evidence of service of the original summons, and in point of fact the justice of the peace must have so decided, for it appears that on the return day of the summons the plaintiff made an affidavit for service by publication, and the justice made his order accordingly and issued an *alias* summons commanding the defendant to appear and answer on the 8th of September, at ten o'clock A. M. The affidavit upon which this order was based sets forth, *inter alia*, "That said defendant has no president, cashier, secretary, managing agent, or other head within this State, defendant being an incorporation, incorporated under the laws of the State of California, having its principal place of business in the city of San Francisco." The order thereupon made, directs publication in the "Territorial Enter-

prise" for the proper period, "and that a copy of the summons and complaint in said action be deposited in the United States postoffice at Virginia City aforesaid, directed to said defendant and W. H. Martin, secretary thereof, at San Francisco, California, Lock Box 1550, office No. 534 California street, postage prepaid."

In pursuance of this order, a copy of the summons was published in the "Enterprise" for the requisite period, but by mistake the time for appearance was printed twelve o'clock, September 8th, instead of ten o'clock of that day. This publication was properly proved by affidavit made and filed on the 8th of September; and, for the purposes of this decision, it will be conceded that the mistake of printing twelve o'clock instead of ten o'clock, and the subsequent entry of judgment by default at eleven o'clock, belong to that class of irregularities in the service of process and conduct of proceedings for which the judgment of an inferior tribunal can not be collaterally attacked, and consequently that this judgment and the proceedings thereunder would be sustained, if it were not liable to more serious objections.

But it was necessary not only to publish a copy of the summons, but to deposit another copy in the postoffice directed to the defendant at San Francisco; and the statute prescribes that such deposit shall be proved by affidavit. Now there never was any affidavit filed in the justice's court showing this fact. But on the trial of this action in the court below, defendant was allowed to prove by the justice of the peace, without objection, that he, the justice, himself deposited the papers in the postoffice on the 1st day of August, of which fact he made a memorandum in his docket. The appellant insists that the failure of the respondent to object to this proof when it was offered, concludes it upon this point. But he misapprehends the position of respondent, which is, that it was not sufficient for him to show an actual deposit in the postoffice, but he was bound to show that the justice had competent proof of the fact before him when he entered the default of the Scorpion company. In other words, that the proceedings of the justice must show upon their face that he had jurisdiction, at least so far as the statute prescribes that the proof shall be made in the form of affidavit, or by other documentary means.

Waiving this point, however, and conceding, as we have said we would, for the purposes of this case, that it is not essential that the proceedings should show on their face every fact necessary to confer jurisdiction, or even those facts for which the statute prescribes documentary proof, and assuming that a justice of the peace, when he makes the deposit of the copy of summons in the postoffice himself, may dispense with an affidavit to the fact, and that it may be established at any time when his judgment is attacked by proof *aliunde*, the question remains: Did the testimony show a compliance with the law? We think not.

The only testimony upon this point which we are able to discover in the record is that of the justice of the peace, to the effect that he deposited a true copy of the complaint and summons in the postoffice, addressed as stated in his docket. The entry in his docket is as follows: "Copy of summons and account mailed August 1, 1873, to Robert Apple or W. H. Martin, San Francisco, Cal." Clearly this was not a compliance with the law, which required the summons to be directed to the defendant. The defendant was the Scorpion Silver Mining Company, and when the justice of the peace made the order of publication, and deposited a copy of the summons in the postoffice, there was no evidence before him that either Apple or Martin was connected with that company in any manner or in any capacity whatever. It is true that on the trial of this case, in the court below, testimony was admitted going to show that in July, 1873, Apple was superintendent of the Scorpion company; but there was not the slightest evidence that he lived or was in San Francisco at that time, and no presumption consequently that he received the summons. Testimony was also admitted showing that Martin was at the time of the trial (1875) secretary of the company, and that he resided in San Francisco in 1873, but there was nothing to show that he was secretary of the company in 1873, and nothing consequently upon which to build an argument that a direction of the summons to the secretary of the company is the same as a direction to the company itself. The letter from Martin to Marzano, dated in 1873, does not tend in the remotest degree to prove that he was then secretary of the Scorpion company. Martin does allude in the letter to "our company," and

appends to his signature the word secretary, but the name of the Scorpion company does not appear in the letter from beginning to end. On the contrary, the heading of the letter, (which is as follows:

W. H. MARTIN, Gen. Agent,	}	CALIFORNIA IMMIGRANT UNION,
Lock Box 1550,		Office 534 California Street.)
San Francisco, Cal.		

goes rather to prove that "our company" was the California Immigrant Union. And if the summons had been directed as prescribed in the order of the justice of the peace, we could only presume from this proof that it would have been received at the office of the California Immigrant Union, or deposited in the lock box of W. H. Martin, general agent.

Upon the whole, we conclude, as above stated, that in the case upon which the defendant relies there was not only not a strict, but not even a substantial compliance with the provisions of the statute authorizing constructive service of summons; and, consequently, that all the proceedings were void. We have not thought it necessary to refer to the authorities which sustain the various points decided, because they are very numerous and almost unopposed. And we have omitted to pass upon many of the objections made by the respondent to the validity of the judgment in the case of *Marsano v. Scorpion Co.*, because our conclusion upon the points discussed renders it unnecessary.

The judgment and order appealed from are affirmed.

1. Party not in possession can not maintain the action to quiet title: *Nevada Co. v. Kidd*, 37 Cal. 283.

2. Bill may be brought before decision of issue at law where destruction of the subject-matter is meanwhile threatened: *Falmouth v. Innys*, Mosely, 87.

3. In action to quiet title defendant can not prove title in stranger: *Niagara M. Co. v. Bunker Hill M. Co.*, 59 Cal. 612.

4. Complaint alleging plaintiff's title, and that defendant claims ownership without right, *held*, sufficient: *Rough v. Simmons*, 2 West C. R., 831.

5. Party in possession must bring action to quiet title; if out of possession, ejectment: *Millegan v. Saveny*, 9 Pac. 894.

PEOPLE V. BOGART ET AL.

(45 California, 73. Supreme Court, 1872.)

¹ **Use of abbreviated name.** The use of an abbreviated name, "Ophir, Copper, Silver and Gold Mining Company," instead of the real corporate name, "Ophir, Copper, Silver and Gold Mining Company of Placer County, California," is not a usurpation, and will not support a proceeding to oust it of its franchises.

Appeal from the District Court of the Fourteenth Judicial District, County of Placer.

The plaintiff, *ex rel.* the attorney-general, commenced this proceeding in May, 1871, to oust "The Ophir Copper, Silver and Gold Mining Company of Placer County, California," from the enjoyment of its franchise, charging in the complaint that under the name of the "Ophir, Copper, Silver and Gold Mining Company" the defendants had usurped and intruded into certain corporate franchises and corporate powers which they had no right to exercise under that name. The answer denies all the material averments of the complaint, and sets up in defense the performance of the acts necessary to be performed to create a corporation in accordance with law. It also avers the real name of the corporation to be the "Ophir Copper, Silver and Gold Mining Company, of Placer County, California." It appeared from the minutes of the company's meetings, which were offered in evidence, that the corporation was sometimes styled in its proceedings the "Ophir Copper, Silver and Gold Mining Company, of Placer County, California," and sometimes called the "Ophir Copper, Silver and Gold Mining Company."

Judgment was rendered for the defendants, and the plaintiff appealed a new trial having been denied.

HAMILTON, for appellant.

TUTTLE, for respondents.

BY THE COURT.

¹ *King v. Randlett*, 5 M. R. 605.

If the officers of a corporation, organized under a particular name, in the exercise of its franchises use an abbreviation of that name, it is not a usurpation, nor will it support a proceeding by *quo warranto* upon the part of the people to oust them from the enjoyment of those franchises: *People v. Sierra Buttes M. Co.*, 39 Cal. 514, and cases there cited.

Judgment and order affirmed.

THE STATE OF NEVADA EX REL. GUERRERO

IV.

PETTINELI ET AL., Respondents.

(10 Nevada, 141. Supreme Court, 1875.)

¹ **Voting stock transferred by unregistered indorsement.** Under a statute which provides that except as between the parties the transfer of stock shall not be valid until the same shall have been entered on the books of the corporation, a stockholder may vote stock which was originally issued to him, although transferred by indorsement and delivery to a friend, if such transfer had not been entered on the books of the company, and the certificate had been returned to him prior to the meeting of the stockholders.

² **Corporate meetings—how called.** When the by-laws provide that meetings of stockholders shall be called by the board of trustees, a meeting called by the president of the company is illegal.

Illegal election of trustees. An election of trustees of a corporation, at which all the stockholders are present but a portion decline to participate, at which the president, though present, did not preside, and no president *pro tempore* was chosen, in total disregard of the by-laws, is illegal and void.

Illegal officer ousted by quo warranto. Upon an information in the nature of a *quo warranto*, if it appears that respondent is unlawfully exercising the office of trustee of a corporation, judgment will be entered that he be ousted and excluded from the office.

The facts are stated in the opinion.

ROBERT M. CLARKE and T. W. W. DAVIES, for relator.

R. H. TAYLOR, for respondent.

¹ *Peo. v. Robinson*, 1 Pac. 156; 64 Cal. 373.

² *Moore v. Hammond*, 6 B. & Cr. 456.

By the Court, EARLL, J.

This is an information in the nature of a *quo warranto* originally brought in this court, to determine the title of respondents to the office of trustees of the Roman Capital Gold and Silver Mining Company.

It appears from the pleadings and evidence that the Roman Capital Gold and Silver Mining Company was incorporated under the laws of this State, and organized on or about the 15th day of November, 1872; that Antonio Sitaro (one of the respondents herein), Nicolo Soffia and the relator, were selected as the trustees, to manage the concerns of the corporation for the first six months, and at the first meeting of said trustees the relator was elected president, and the respondent, Thomas Pettineli, was elected secretary of the company. The time designated by the by-laws of the company for the election of trustees to succeed those thus selected passed without an election being held, and there was no attempt to convene the stockholders for that purpose until March 31, 1874, when the relator, as president of the company, caused a notice to be published in the Virginia Evening Chronicle, which stated that "A meeting of the stockholders of the Roman Capital Silver Mining Company will be held at room No. 21, Douglass Building, Virginia, at the hour of 7 o'clock p. m., on Monday, April 6, 1874, for the purpose of electing officers of said company to serve for the ensuing year, and for the transaction of such other business as may properly come before it."

The capital stock of the corporation is divided into six thousand shares, and persons representing and claiming to represent the whole thereof assembled at the time and place designated in said notice, and among whom the president and Antonio Pitagna were the first to arrive, and each having in his possession fifteen hundred shares of the stock which was then standing in their respective names upon the transfer books of the company. Soon thereafter the secretary, with others representing the other half of the stock, entered the room, and there being two tables in the room, at one of which the president was seated, the secretary and those who came with him placed themselves at the other. The stockholders having thus assembled, the president called the meeting to

order, read the notice convening the same, and exhibited his certificates, representing fifteen hundred shares of the stock, and placing the same upon the table requested the other stockholders present to exhibit theirs also. Thereupon Antonio Pitagna exhibited and placed upon the president's table certificates representing fifteen hundred shares thereof. No others exhibiting or presenting any certificates of stock, the president requested the secretary to come to his table and proceed with the election of officers. Instead of complying with the president's request the secretary replied, "If you want a meeting come to our table." And thereupon, at the suggestion of one Montgomery, who claimed to represent, as proxy for Henrietti Pettinelli, wife of the secretary, fifteen hundred shares standing upon the books of the company in her name, those who came to the room with the secretary proceeded to ballot at his table for trustees, neither the president nor Antonio Pitagna taking any part therein. The parties were occupied in the election from two and a half to three minutes; and immediately thereafter the secretary gathered up his books, and with those who participated in the election departed the room. It appears from the minutes of the secretary, entered in the journal of proceedings kept by him, that there were three thousand shares voted, and that Antonio Sitaro, Dominico Gargaro and Henrietti Pettinelli, each received all the votes thus cast. The evidence further shows that a certificate representing fifteen shares, originally issued to Antonio Pitagna and included in the fifteen hundred shares which he exhibited and placed upon the president's table, had been by him previously indorsed and given to a friend in San Francisco; but the transfer thereof had not been entered upon the books of the company, and the certificate had been returned to him prior to the meeting. It is claimed for respondents, that because the fifteen shares had been thus transferred Pitagna was not authorized to represent the same, and consequently there were but five thousand nine hundred and eighty-five shares which could be represented at the election; and Antonio Sitaro, Dominico Gargaro and Henrietti Pettinelli, each having received three thousand votes, and the votes thus received being a majority of the shares which those present were authorized to represent, were therefore duly elected to

succeed the original board of trustees. We are unable to perceive any valid objection to the right of Pitagna to represent and vote the stock referred to. The certificate was issued to him, was then in his possession, and no transfer thereof had been entered upon the books of the corporation; and so far as appeared therefrom he was the owner of the stock. True, the statute provides that shares of stock "may be transferred by indorsement and delivery of the certificate thereof," but it further declares, that "such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer." Stats. 1864-5, p. 361, Sec. 9. In view of this statute, we think the right of Pitagna to vote the stock in question is evident. The stock not having been transferred upon the transfer book, the private agreement or understanding between him and his friend was a matter between themselves, with which neither the corporation nor its stockholders have any concern: 7 Cow. 402; 19 Wend. 37; *Bereich v. Marye*, 9 Nev. 316. But irrespective of any question as to the right of Antonio Pitagna to represent or vote the fifteen shares of stock referred to, it is clear that the election was invalid and can not be supported upon the facts here stated. The statute provides: "If it shall happen at any time that an election of trustees shall not be had on the day designated by the by-laws of the company, the corporation shall not for that reason be dissolved; but it shall be lawful, on any other day, to hold an election for trustees, in such manner as shall be provided for in the by-laws of the company; and all acts of the trustees shall be valid and binding on the company until their successors shall be elected." 2 Comp. L. 3394. There is no provision in the by-laws of the Roman Capital Gold and Silver Mining Company authorizing the president to convene a meeting of its stockholders for any purpose, but on the contrary, by article 4, the power is expressly vested in the trustees, and necessarily requires the action of the board in order to convene a legal meeting. It is true, in this case, that all of the stockholders of the company assembled pursuant to the call of the president, and by mutual agreement and

consent of all they might have proceeded to the election of trustees; but it required the consent of all the stockholders to become binding upon any. Here, then, was no such consent, and hence the attempted election by only a portion of the stockholders was illegal and void: *Ang. & Ames on Corp.*, Secs. 488, 489, 491, 492, and 495; *The King v. Theodorick*, 8 East, 543; *The King v. Gaborian*, 11 East, 77; *Atlantic De Laine Co. v. Mason*, 5 R. I. 471-2; *Stow v. Wyse*, 7 Conn. 214; 8 Met. 301.

But if the meeting had been regularly called, the claim of respondents could not be sustained, because there was no organization or regularity in the proceeding. What occurred at the secretary's table, and which is relied upon by respondents, can not in any sense be regarded as an election. Article 7 of the by-laws provides that "the president, when present, shall preside at all meetings of the company, and at the board of trustees, and in his absence a president *pro tempore* shall be chosen." * * * This provision of the by-laws was totally disregarded. The president, although present, did not preside at the election, nor was there a president *pro tempore* chosen in his stead; and no person who participated in the proceeding was authorized to receive the ballots, or to declare the result; hence it follows that there was no legal election, and that the relator and Nicolo Soffia, together with the respondent, Antonio Sitaro, constitute the legal board of trustees of the company, and are entitled to exercise the duties thereof.

It only remains to consider the proper judgment to be entered in the case.

It does not appear that Thomas Pettinelli intruded himself into the office, or at any time claimed to exercise the office of trustee; therefore the writ must be dismissed as to him.

The respondent, Antonio Sitaro, being one of the trustees selected to manage the concerns of the company for the first six months after its organization, and not having been legally superseded, is entitled to exercise the same under that appointment. But in his answer he claims to exercise the office only by virtue of the pretended election of April 6, 1874; therefore judgment must be entered that the said Antonio Sitaro be ousted and altogether excluded from such office; but to be so entered as not to affect his right to exercise the office of

trustee of said company by virtue of his original appointment.

It appearing that the respondent, Dominico Gargaro, is unlawfully exercising the office of trustee of said company, judgment must be entered that he be ousted and altogether excluded from such office.

Judgment is so ordered.

THE PEOPLE EX REL. ROBINSON V. THE PITTSBURG
RAILROAD CO.

(53 California, 694. Supreme Court, 1879.)

Quo warranto to correct abuse of eminent domain. A coal mining company, in order to avail itself of the power of eminent domain, organized as a railroad corporation, nominally for the transportation of freight and passengers for the public use and benefit, but really for its private use in the transportation of coal from its mines, and by judicial proceedings, condemned land which was the private property of the relator. *Held*, that the proceedings in condemnation amounted to an imposition upon the court, and that a demurrer to a complaint, in an action to annul the franchise and dissolve the corporation, which set forth the above facts, should have been overruled.

Idem—Relief through attorney-general. It was competent for the State, upon discovering the misuse of its authority, to interpose by its attorney-general to correct the abuse.

Appeal from the District Court of the Third Judicial District, San Francisco.

The action was brought to annul the defendant's franchise and to dissolve the corporation.

The complaint alleges that in September, 1861, H. F. Allen, C. W. Lander, Levi Stevens, Judah Baker, Jr., J. M. Johnson and C. C. Baker formed a corporation called the "Pittsburg Coal Mining Company," for the purpose, as declared in its articles, of mining for coal in Contra Costa county. That for the conduct of their business it became desirable to have a railroad running from the mines to the San Joaquin river, through the Rancho Los Medanos, a distance of about five miles, in order to transport their coal to a convenient place of shipment. In order

to avail themselves of the power of eminent domain, the same parties, with a few others who were also stockholders in the said coal company, formed another corporation, designating it "The Pittsburg Railroad Company," and declared in their articles of incorporation that the purpose of the new corporation was to transport freight and passengers, intending it to be understood that the proposed railway was to be for the public use and benefit. Subsequently, by the usual judicial proceedings, they procured the condemnation of sufficient land of the Rancho Los Medanos, which was the private property of the relator, Robinson, for the purpose of the railway. The railway was then constructed and has since been continuously in operation, but has been exclusively engaged in carrying coal from the mines of the Pittsburg Coal Company, having no cars for passengers, or for the convenience of the public in any way, and no freight cars except those designed for carrying coal.

The defendant demurred that the complaint did not state a cause of action, and also upon special grounds. The demurrer was sustained and the plaintiffs appealed.

HAMILTON, Attorney-General, and E. L. GOOLD, for appellant.

J. B. HARMON, for respondent.

BY THE COURT.

The demurrer to the complaint was improperly sustained. In its proceedings for the condemnation of Los Medanos Rancho for railway purposes, the defendant (assuming to exercise the eminent domain) purported to act as agent of the State in the appropriation of private property for *public use*. It now appears by the complaint, however, that this assumption was a mere false pretense; that the use for which these lands were taken was in fact a mere private use, and one to which the eminent domain is of course inapplicable. The proceedings in condemnation amounted to an imposition upon the court before which they were had.

It is certainly competent for the State, upon discovering the misuse of its authority, whereby the private property of one of its citizens has been wrongfully taken for the private use of

another, to interpose by its attorney-general to correct the abuse.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the complaint. Remittitur forthwith.

1. Corporate officers can not be removed under *quo warranto* proceedings: *Neall v. Hill*, 1 M. R. 80; nor can they be used to try the right to an office: *Sherman v. Clark*, 7 M. R. 483.

2. A court has no common-law power to dissolve a corporation at the suit of an individual stockholder. *Strong v. McCagg*, 55 Wisc. 624.

FLETCHER ET AL. V. THE GREAT WESTERN RAILWAY
COMPANY.

(4 Hurlstone & Norman, 242. Court of Exchequer, 1859.)

¹ No right to surface support where company refuses to purchase minerals. A railway company, having purchased land for the purpose of their railway by agreement, and having taken a conveyance in the form given in the Lands Clauses Consolidation Act, and not being willing to purchase the minerals after notice of the owner's intention to work them, pursuant to S. 78 of the Railways Clauses Consolidation Act, 1845, is not entitled to the adjacent or subjacent support of the minerals; but the owner is entitled to get them notwithstanding that the getting of such minerals would cause the surface to subside. *Held* accordingly, that where, under such circumstances, the company had given notice that the working of the mines was likely to damage the works of the company, the owner of the minerals was entitled to recover compensation which had been assessed under the 78th section.

This was a *spécial* case stated by order of *Nisi Prius*. The declaration stated that the defendants were authorized to construct and did construct a certain railway called the Birmingham, Wolverhampton and Dudley Railway, by "The Birmingham, Wolverhampton and Dudley Railway Act, 1846." That the plaintiffs were the owners of mines and minerals in the county of Stafford, lying under the railway of the defendants and within forty yards thereof, and were entitled to work and get the same, and were desirous of working the same; and that the plaintiffs, on the 19th of November, 1857, gave the defendants due notice in writing of their intention so to do after the expiration of thirty days from the giving of such notice; that the defendants, on the 17th of December, 1857, gave notice to the plaintiffs that it appeared to the defendants that the working of a certain portion of the said mines and minerals was likely to damage the works of the railway, and that the defendants were willing to make compensation for such portion of the said mines and minerals to the plaintiffs; that the plaintiffs and defendants did not agree as to the amount of such compensation; that the compensation claimed by the plaintiffs exceeded £50, and the plaintiffs desired such

¹ Compare *Roberts v. Haines*, 6 El. & Bl. 643; 7 Id. 625; *Birmingham Co. v. Dudley*, 7 H. & N. 969, 890.

question of compensation to be tried before a special jury, and gave due notice on the 26th of March, 1858, of such desire to the defendants before the defendants had issued any warrant to the sheriff, etc.; that the defendants duly issued their warrant, under their common seal, to the sheriff of the county of Stafford, requiring him to nominate a special jury for such trial, and a special jury was duly nominated and reduced by the said sheriff; that the sheriff duly summoned the twenty special jurymen remaining after such reduction, to meet on, etc., at, etc., such time not being less than fourteen nor more than twenty-one days after the receipt of such warrant, and such place not being more than eight miles distant from the said mines and minerals, and forthwith gave notice to the defendants of the time and place so appointed by them; that at the same time and place, the plaintiffs and defendants, by their agents, the twenty special jurymen and the sheriff being present; the twelve jurymen who first appeared on their names being called over, made oath that they would truly assess such compensation, etc.; that the question of such compensation was duly inquired into, etc., and the compensation assessed by the said jury to the plaintiffs was £100; and the sheriff gave judgment for the said sum, and the said verdict and judgment was signed by the sheriff, and being so signed was duly delivered to the clerk of the peace for the county; yet the defendants have not paid, etc.

The defendants pleaded, that before the plaintiffs became owners of the said mines and minerals, the defendants, in pursuance of the powers of the said act, were seized in their demesne, as of fee, of the lands under which the said mines and minerals were (save and except the said mines and minerals) under a deed of conveyance to them, executed by Sir Francis Scott and Lady Emily Foley, and had become so seized, and the land was so conveyed for the purpose that the defendants should make a part of their railway upon the same, of which Sir F. Scott and Lady Emily Foley at the time of the conveyance had notice; that the plaintiffs, afterward, and after the making of the railway upon the said land, became the owners of the said mines and minerals by virtue of a certain grant and conveyance thereof to them made by Sir F. Scott and Lady Emily Foley; and that the plaintiffs, when

they became such owners, had full notice that the said land, and the surface thereof, had been so purchased by and conveyed to the defendants for the purpose aforesaid, and that part of the said railway had been so made upon the same; that before and at the time when the plaintiffs became such owners, the defendants had, by virtue of the said conveyance to them and by reason of their having so made part of the said railway upon the said land and surface, become and then were entitled to reasonable adjacent and subjacent support for their railway, of which the plaintiffs then had notice; and that the working of the said mines, of which the plaintiffs gave such notice as in the declaration mentioned, would and must have taken away and destroyed the said adjacent and subjacent support; and that such taking away and destruction of support were and are the damage likely to accrue to the said works, in the said notice mentioned; and that the defendants gave the notice in order to prevent, and because they had no other means of preventing, the plaintiffs from taking away and destroying such adjacent and subjacent support, by working the mines and not otherwise, and because great injury and damage would have been done to the railway by the said taking away and destroying the adjacent and subjacent support; and that, upon the holding of the inquisition, the defendants appeared and protested that they were not liable to pay any compensation for the mines, and that they would not be bound by the finding of the jury as to the amount of such compensation; and that, upon the holding of the inquisition, the jurors gave a verdict that the getting of the mines would cause the subsidence of parts of the railway; and further, that if there were no railway upon the land, the getting of the said mines would cause the land and the surface thereof to subside.

The plaintiffs took issue upon the plea.

The facts relied on by the defendants as proving their plea are the following:

Sir F. Scott and Lady Emily Foley being seized in fee, in equal moieties, of the land containing the minerals in respect of which compensation was claimed, by a written agreement, dated the 8th of June, 1852, contracted to sell part thereof to the defendants, and on the 24th of June, 1852, by deed, con-

veyed such part to the defendants. On the 30th of June, 1854, Sir F. Scott and Lady Emily Foley, by another written agreement, contracted to sell the residue of the said land to the defendants, and the same was conveyed by them to the defendants by a deed dated the 21st of December, 1854. The first mentioned deed was as follows: "We, Sir Francis Scott, Baronet, the owner in fee of one undivided moiety of the hereditaments hereinafter conveyed, and the Right Honorable Emily Foley, commonly called Lady Emily Foley, the owner in fee of the other undivided moiety of the hereditaments hereinafter conveyed, in consideration of the sum of £7,940, paid to us in equal moieties, pursuant to 'The Birmingham, Wolverhampton and Dudley Railway Act, 1846,' by the Birmingham, Wolverhampton and Dudley Railway Company, incorporated by the said act, do hereby convey to the said company, their successors and assigns, all those pieces of ground situate at Bradley in the parish of Sidgley, and in the township of Bilston in the parish of Wolverhampton, in the county of Stafford, containing 7 a. 1 r., etc., and also all buildings and erections now standing and being on the said pieces of land or any part thereof, the particular shape, boundaries and position of which said pieces of ground are delineated in the plan hereupon indorsed, and which said pieces are numbered 37 and 38 in the map and book of reference of the said railway, deposited, etc.: together with all ways, rights and appurtenances thereto belonging, and all such estate, right, title or interest in and to the same as we are or shall become seized or possessed of, or are by the said act empowered to convey; to hold the said premises to the said company, their successors and assigns forever, according to the true intent and meaning of the said act. In witness whereof we, the said Francis Scott and Lady Emily Foley, have hereunto set our hands and seals, this 24th day of June, 1852.

"Francis (L. S.) Scott. Emily (L. S.) Foley."

The deed of the 21st day of December, 1854, was, with the exception of the mere description of the parcels and the date, in precisely the same terms.

The defendants purchased and acquired the land for the purpose only of making the railway by the act authorized to be made, and Sir F. Scott and Lady Emily Foley knew that fact.

And it is the fact, as alleged in the plea, that the plaintiffs after the making the railway upon the land, became the owners of the mines and minerals, by virtue of a conveyance by the said Sir F. Scott and Lady Emily Foley; and they, the plaintiffs, knew that the surface of the land had been purchased by, and conveyed to the defendants for the purpose aforesaid, and that part of the railway had been made upon it.

The working of the mines would have taken away and destroyed the adjacent and subjacent support of the railway, and such taking away and destruction of support were and are the damage likely to accrue to the said works referred to in the plaintiffs' notice.

On the inquisition, the defendants appeared and made the protest mentioned in the plea; but they also went on and contested the amount of compensation.

The following is a copy of that part of the inquisition to which the last allegation in the defendants' plea relates, and the findings are, as alleged in the plea, true in point of fact.

The jury assess and give a verdict for the sum of £100 to be paid by the said company to the said R. Fletcher and D. Rose by way of compensation in respect of the said mines of thick coal under and near to such parts of the said railway as were in the notice of the company, dated the 19th of December, 1857, referred to. And the jurors further find and give a verdict that the getting of the said last mentioned mines would cause the subsidence of parts of the said railway; and further find and give a verdict that, if there were no railway upon the said lands, the getting of such mines would cause the said lands and the surface thereof to subside.

The questions for the opinion of the court are: First, whether the verdict is to be entered for the plaintiffs. Secondly, if not, whether the plaintiffs are entitled to judgment *non obstante veredicto*. If the first question is answered in the affirmative, a verdict for £100 and judgment thereon are to be entered for the plaintiffs, etc.

GRAY (with whom was KETTLE), for the plaintiffs.

WHATELY (with whom was PHIPSON), for the defendants.

POLLOCK, C. B.—The plaintiffs are entitled to recover the sum awarded to them. It was contended on the part of the defendants, that the conveyances having been by agreement between the parties, the case differs from that of a purchase under the compulsory clauses of the act, and that the clauses in question are not intended to interfere with the common law rights of the parties. Possibly the provisions may be unjust, or in contravention of the common law rights of the parties; but their meaning is clear, and the legislature having pronounced, we are bound to decide accordingly. The 77th section provides that mines shall be deemed to be excepted out of the conveyance, unless they shall have been expressly named therein, and conveyed thereby. That is enacted of all land purchased by any company constituted under the act. Now this land was purchased by the company, in the form given by the Lands Clauses Consolidation Act. The consequence is, that the company purchased land, expressly excepting the minerals, which continued to belong to the former owners of the soil. The 78th section provides that mines under the railway shall not be worked, if the company are willing to purchase them. All persons owning mines are put on the same footing, whether they are merely owners of mines under the railway, or persons who have sold the surface reserving the minerals. If the company are unwilling to purchase the owner may work the mines. If the company think that it is for their interest to exclude the owner from getting the coal, in order to avoid the risk of mischief to their works, they may stop him by buying the coal. If they are indifferent about it, or can not afford to buy, the owner may proceed to get the coal in the usual way. The plaintiffs are therefore entitled to judgment.

MARTIN, B.—I am of the same opinion. The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), form a code of law under which these public undertakings are constituted. There is a provision in the Lands Clauses Consolidation Act for the taking of lands by agreement, and a form is given. Here, in pursuance of an agreement between Sir F. Scott and Lady Emily Foley, and the defendants, the conveyance of the 24th of June, 1852, was executed. It is clear that the land

was purchased under the act and not under the ordinary contract between vendor and vendee. The conveyance would have been void at common law. There is no doubt that the defendants bought by agreement, in the same way in which railway companies purchase land. I see no reason to suppose that the provisions made by the sections in question are not perfectly just. The defendants never bought or paid for the mines, but only what they were entitled to buy, reading the acts together. The 77th section shows that the mines are not conveyed, because they are not expressly conveyed. They remained in Sir F. Scott and Lady Emily Foley, not by reservation, as in *The Caledonian Railway v. Sprot*, 2 Macqueen, 449, but by the act of the legislature. The 78th section provides that, the mines being excepted, the owner shall only have a conditional right to work them, and enables the company to take steps to prevent any chance of injury to the railway. The 79th section makes provision, that in case of the company being unwilling to purchase the minerals the owner must get them in a proper and careful manner. Railway companies are, therefore, protected from being obliged to buy mines which they do not want; they are enabled to buy to secure themselves from injury, and if they do not choose to buy, the owner is bound to use proper care in working. *The Caledonian Railway v. Sprot*, 2 Macqueen, 449, did not turn upon this act of parliament but upon the construction of a conveyance regulating the rights of the parties as between themselves. The plaintiffs are entitled to have the verdict entered for them. The plea is bad; therefore every averment in it must be proved. It contains an allegation that the defendants were entitled to reasonable support for their railway. That allegation is not proved, the defendants being only entitled to a conditional support.

WATSON, B.—I concur with the rest of the court. The conveyance in the present case is entirely a statutory proceeding. The plaintiffs are entitled to the mines reserved under the act, and cases relating to common law rights have no application. The 77th section was enacted for the advantage of both parties. Railway companies are not to be incumbered with mines which are useless to them. The mines under the land of the company are reserved to the owners of the land at

the time of the conveyance. If the owners desire to work them, or get the minerals within a certain distance of the railway, they must give thirty days notice, which is required because, in consequence of old workings, the railway might be endangered by workings at a distance. The company may express its willingness to purchase, and thereby stop all working. The plea is not proved, and the plaintiffs are entitled to have the verdict entered for them.

Verdict to be entered for the plaintiffs.

WRIGHT V. THE CHESTNUT HILL IRON ORE CO.

(45 Pennsylvania State, 475. Supreme Court, 1863.)

A railroad held to pass on sale of iron works as an "improvement."

A sheriff's sale upon an execution against the owners of iron works, under which were seized several tracts of land, with "the buildings, furnaces and other improvements thereon erected, known as the Shawnee Iron Works," passes to the purchaser a railroad used in connection with the furnaces, and extending therefrom across intermediate lots of other owners to the landing where coal and iron ore were usually delivered for the use of the furnaces, although the word "appurtenances" was omitted in the levy.

Omission of "appurtenances." Enumeration of incidents of real property which pass without the word "appurtenances."

Right of way goes with the road. Where a railroad passes to a sheriff's vendee as parcel of the works seized and sold, the right of way which the owner of the tract had, passes to the purchaser from the sheriff.

Error to the Common Pleas of Lancaster County.

This was an action of ejectment, brought November 10, 1859, by John A. Wright against the Chestnut Hill Iron Ore Company, for so much of two lots of ground as is covered by the railroad which leads from the tunnel head of the Shawnee Iron Works to the Susquehanna river.

The plaintiff claimed title to the lot as the vendee of the sheriff of Lancaster county, by whom they were sold under an execution against Archibald Wright, to whom they had been conveyed, December 10, 1855, by Rhoda, Charles M., and Elizabeth Wright.

The defendants claimed as purchasers at sheriff's sale of the Shawnee Iron Works, under an execution against the owners, Archibald and John Wright.

The Shawnee Furnace came, several years ago, into the possession of Messrs. A. and J. Wright, who reconstructed and extended it, and built a railroad from the tunnel head to the bank of the Susquehanna, a distance of about half a mile, a portion of which was an inclined plane, whereby the coal and ore that were drawn in cars from the river to the commencement of this slope were, by means of a steam engine, bolted to the trestle-work of the plane, carried thence to the top of the stack, into which they were delivered from the cars. By this railroad, thus operated, all other modes of transportation for the materials used in the manufacture of the iron, except the limestone employed to flux the ore, were superseded. Four hundred and eighty yards of the railroad were on the land belonging to the furnace, two hundred and seventy-five yards on property belonging to John Pusey, two hundred and fifty yards on the two lots before mentioned, held by Archibald Wright, under the deed of Rhoda Wright, etc., dated December 10, 1855, and one hundred and five yards on the wharf and property attached to it. All the hauling of the coal and ore to the furnace, and the manufactured iron from the furnace to the wharf on the river, was upon this railroad.

On a judgment obtained against the Messrs. A. & J. Wright, the Shawnee Furnace was, under and by virtue of an execution, duly levied upon, the sheriff describing the furnace property, and setting forth in his return that he levied upon the said furnace, buildings and improvements, but without using the term *appurtenances*. He afterward advertised the same for sale, describing in the advertisement the said furnace buildings and the *appurtenances* as the property of the defendants to be sold. At the time of the sale, the defendants, Messrs. A. & J. Wright, being present, the sheriff read this advertisement and description, with the conditions of sale, and proceeded to sell the same according to that description. It was sold to John Fallon, and a deed conveying the property, with the description contained in the advertisement and conditions, was made to him by the sheriff. John Fallon after-

ward conveyed the same, with the identical description, to Percy Pyne, who conveyed it in like terms to the Chestnut Hill Iron Ore Company, the defendant.

The question was whether the land of the two lots conveyed by Rhoda Wright and others, in the deed of the 10th December, 1855, aforesaid, on which the railroad was laid, was conveyed by the sheriff's deed to John Fallon or not. It was agreed that the question should be confined to so much of the said land as constituted the road, or on which the road was founded, with the slopes on either side made by the grading, and it was conceded that, so far as the levy and deed are concerned, this is a question of law. It was embraced in the first point proposed by the defendant, and the counsel having submitted it without discussion, the court (HAYES, P. J.) decided that this land and the railroad passed and were conveyed by the sheriff's sale and deed, not only by the terms of the levy, advertisement, and conditions of sale, but as an incident of the furnace, necessary to its use and operation, according to the design of the Messrs. Wright in their construction of the same.

The learned judge added that the presence of Messrs. A. & J. Wright at the sale, and hearing the conditions and advertisement read without objection, confirmed this view of the case, and precluded them from any further exception to the title of an innocent purchaser. The jury were therefore directed, if they believed that they were present at the sale, to render their verdict in favor of the defendant.

THOMAS E. FRANKLIN, for plaintiff in error.

THADDEUS STEVENS and O. J. DICKEY, for defendant.

The opinion of the court was delivered July 1, 1863, by THOMPSON, J.

The question involved in this controversy is whether the entire railway, with its inclined plane to the tunnel heads of the defendant's furnace stacks, and extending to the Susquehanna river, a distance of about 1,100 yards, in use in connection with the Shawnee Iron Works at the time of the levy and sale, passed by that sale under the circumstances disclosed.

The circumstances were briefly these: Between the ground and adjoining lots on which the company's furnaces stand and the river lot there are two intervening lots, the roadway over which gives rise to this suit. They belonged to Rhoda Wright before the road was built, but she granted a right of way over them by parol to the Shawnee Iron Works Company, and they constructed their road in 1854, which was in use, in connection with the furnaces, transporting coal and ore from the river to the furnaces and carrying metal to the Pennsylvania railroad, from that time to the time of the levy and sale. There were two other intervening lots belonging to Jonathan Pusey, over which they also had a right of way, and we hear of no trouble about them. The sheriff's sale of this property to the party from whom the defendants derive title took place in 1858. Prior to that time and in 1855 Rhoda Wright and C. M. Wright conveyed the two lots mentioned to Archibald Wright, one of the members of the firm of the Shawnee Iron Works, of course subject to the right of way formerly granted to him and his brother for the use of the company. The levy was of the ground on which the furnaces stood and adjacent lots, and the lot or lots at the river, without notice of the two intervening or Rhoda Wright lots. All this property passed to the purchaser at the sheriff's sale, and of course the railroad as laid upon them. But the plaintiff, who afterward, and in 1859, levied on these lots on an execution against Archibald Wright, and had them sold, and bid them in himself, claims that portion of the road or roadbed upon these lots, and has brought this ejectment for the ground occupied by the roadbed. His claim is not rested on the ground of want of knowledge of the road, or that it was constructed by the former owners of the Shawnee Iron Works, or its purpose. It was on the ground long before the lien of his judgment attached, and he was present at the sale when the other parts of it unquestionably passed to the purchaser. It was in fact so advertised, cried, sold, and a deed made for it, as would have undoubtedly passed it, but for the fact that the word *appurtenances*, used in the advertisement, was not in the levy; and on this ground the plaintiff, claiming that the levy was specific, and rightfully, too, claiming that unless in special circumstances this must control the question as to what was

sold, now claims that the road and right of way did not pass by the sale under which the defendants claim. To determine this we must look at the levy. The material part of it, omitting the description of the ground, is as follows :

“By virtue of the within writ, I have seized and taken in execution all the following described tracts, pieces, or lots of land, with all and singular the buildings, furnaces, and other improvements thereon, known as the Shawnee Iron Works.”

Are we bound to consider this levy so specific as to exclude everything not specially mentioned, as contended for with some plausibility, by the counsel for the plaintiff in error? Let us see. The levy was of the lots and lands of the defendants, as described, “with all and singular the buildings, furnaces, and *other improvements* thereon, known as *The Shawnee Iron Works*.” Now, here is an enumeration of the items of the levy, it is true, but there is added what describes the property or establishment intended to be sold. If any part of what was intended to be levied on was omitted to be enumerated, the maxim “*falsa demonstratio non nocet*,” will apply. It will not be vitiated by this error, for the general description shows what was intended. Things should be described by their proper names or descriptive terms, but things may pass under any denomination by which they have been usually distinguished: *Finch's Case*, 6 Rep. 62. We can not disregard this part of the description, for it is the requirement of the law that if any part of an entire establishment, such as a mill or foundry, or a furnace establishment, be seized in execution, the whole must be sold. If the descriptive parts of the levy omit anything which is parcel of the whole, we must look to the entire levy to see what was intended to be seized; and here we discover that the description does not enumerate all that constituted the property known as the Shawnee Iron Works, but it declares that it is the works known by that name which are seized and to be sold. As the levy, therefore, does not exclude the part claimed by the plaintiff, it must be held included by the general description, and will pass: *Buckholder v. Sigler*, 7 W. & S. 154. What is most material and most certain in a description shall prevail over that which is less material and less certain: 6 Cowen, 701 and note. Now, can it be doubted that this railway, with its stationary engine at the

head of the plane, constructed at a great expense, alone for the successful operation of the furnaces, was not parcel of the works known as the Shawnee Iron Works? It had no other object and was of no use otherwise, and it was attached to and partly operated by the furnaces. Could a bidder at the sale, seeing all this, doubt that it would pass under a sale of the entire premises? But if there were doubts arising out of the terms of the levy itself, the rule is that the construction shall be favorable to the plaintiff, in furtherance of his remedy to collect his debt rather than that he should lose it: *Inman v. Kutz*, 10 Watts, 100. Certainly, I think, the first and only impression would be, that a structure like this, having its only utility in connection with the premises, was part and parcel of it.

To preserve the entirety and promote the utility of property connected and used together or as a unit, many things pass without the words *cum pertinentiis* or *appurtenances*, as incidents. In Washburn on Easements, 34, many instances are given, with the authorities English and American. Thus, the grant of a mill passes the headwater by which it is carried; so it carries a right to flow the grantor's land, and the whole right of water which had been previously used, with it, by the grantor; so it carries the flow of water in the race. So the devise of a mill carries buildings, land, and privileges necessary to its use. So the exception from the grant of a larger estate of the "brick factory" was held to include with such factory, the land on which it stood, and the water privilege belonging to the same: *Allen v. Scott*, 21 Pick. 25. The grant of half a dam conveys with it half the water-power: *Runnels v. Bullen*, 2 N. H. 532. So the reservation of a mill site embraces not only the land of such site, but the right of flowage of a pond for the use of the mill: *Oakley v. Stanley*, 5 Wend. 523. These rights do not pass alone on the ground of absolute necessity, as some of the more ancient cases seem to show, or on the principles governing rights of way of necessity. "One general test," says Washburn, "is how far the incidents claimed are necessary to the *reasonable enjoyment* of what is expressly granted." "The good sense of the doctrine on this subject," said Story, J., in *Whitney v. Olney* 3 Mason, 280, "is that by the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its benefi-

cial use and enjoyment, or in common intendment is included in it, passes to the grantee." In Broom's *Maxims*, title "*Rights and Liabilities of Property*," page 199, this doctrine is treated, and it is stated by that very learned and excellent writer, "that in a very recent case it was held that a certain coal-shoot, water and other pipes, all of which were found by a special verdict to be necessary for the *convenient* and beneficial use and occupation of a certain messuage, did, under the particular circumstances, pass to the lessee as integral parts of such messuage." *Hinchcliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1.

We have one case of property passing as incident to the general grant, which is opposite to the doctrine asserted; it is *Buckholder v. Sigler*, 7 W. & S. 154. There the owner of a tract of land purchased a small piece, about one acre, adjoining, for the purpose of using it in connection with the larger tract, on which he was about to erect a mill. It was held that he thereby made it a part of the whole; and a levy and sale by the sheriff of the larger tract, without a description including the smaller, carried the whole to the purchaser. This, too, without the word *appurtenances*, or any equivalent term, being used in the levy. So in *Grubb v. Guilford*, 4 Watts, 223, a similar doctrine had been stated.

If, then, this railway was parcel of the machinery useful and necessary in the manufacture of iron, and thus in effect parcel of the establishment, I can not see why it should not pass by the sale of the property to which it was attached, and in connection with which it was solely used. It was in the same ownership with the furnace property, at the time of the levy belonged to it, was open to the eye of the bidders, and notoriously used as part and parcel of the property. I regard it as much a necessary part of the Shawnee Iron Works as the bridge-house, casting-house, or other convenient buildings. It is possible to make iron without these conveniences merely, but as they are usually necessary to its successful manufacture they become part of the establishment, and will pass with a sale of general premises. So of a short and special railway, like the present, designed and used in aid of the principal agent in the manufacture, to supply it with the raw materials, ore and coal.

The purchaser at sheriff's sale had, by his purchase, beyond

all controversy, both ends of the railway. It passed to him as incumbent of the lots sold. The intermediate lots did not pass. But as the roadway passed over them, and as the right of way existed in them as well as it existed in the lots of the defendants in the execution, it passed at the levy and sale, so far as these lots are concerned, as incident to the works, or we have the absurdity of selling the ends of a road with a portion of the middle out. But we have illustrated this idea sufficiently in the foregoing opinion. We think the defendants' title to the railway is sustainable on both grounds. We see nothing in the errors assigned to the a mission of evidence, and as the learned judge below arrived at a correct result, the
Judgment is affirmed.

LOVERING ET AL. V. THE BUCK MOUNTAIN COAL CO

(54 Pennsylvania State, 291. Supreme Court, 1867.)

Coal contract impliedly based on transportation facilities. A coal company under its charter constructed a railroad to connect with Lehigh navigation, which thus notoriously became indispensable for the transportation of its coal. All contracts with the coal company were made in view of these facts. The coal company contracted with plaintiffs for the delivery of a large quantity of coal during a season. Before the time for delivery of a large part of the coal, a flood swept away all the works of the navigation company, so that the coal company were prevented from fulfilling their contract. *Held*, that they were excused from compliance while they were so prevented.

Idem—Act of God. The coal company would be relieved from exact compliance by an act of God, over which they could have no control, and which they, not being the owners of the navigation works, could not have provided against.

Contract's with colliery made with reference to transportation—Price made dependent on freight. In a contract for the delivery of coal the colliery company stipulated for an advance in price, if any advance on freight and tolls accrued before a time fixed. The company had a right to be paid for any such increase by the most usual and ordinary mode.

Idem—Tender. The offer to furnish coal on the basis of the contract, including advance on freight and tolls, if refused, was a sufficient compliance by the company.

¹ *Rowland v. Lehigh Co.* 28 Pa. St. 215 ; *Lake Shore Ry. v. Bennett*, 89 Ind. 457.

Certificate from Nisi Prius.

This was an action of assumpsit to January term, 1864, by Joseph S. Lovering and others, trading as Joseph S. Lovering & Co., against the Buck Mountain Coal Company. The plaintiffs declared in assumpsit on a contract by which the defendants agreed to deliver them "4,000 tons of the best quality Buck Mountain egg coal," to be delivered at such times as the plaintiffs required in the plaintiffs' carts at the defendants' wharf, at \$3.43 per ton, and for the last 3,000, in "addition any advance in freight and tolls which might take place on or before the 1st day of July, 1862," the plaintiffs to pay the government tax; the breach was the failure to deliver according to the contract.

The negotiation which resulted in the contract sued on commenced with the following letter from the plaintiffs:

"Philadelphia, 16th April, 1862.

"Mr. Wm. P. Jenks, Pres't.

"Dear Sir:—Please inform us of your lowest price for 4,000 tons Buck Mountain egg coal, best quality, to be delivered at such times as we may require it, in good order, weighed in our carts, from your wharf, on Beach street above Poplar.

"Payment to be made on the 1st of each month for the delivery of the preceding month."

After some further correspondence and negotiation, the parties completed the contract through the following two letters:

"Philadelphia, May 28, 1862.

"Messrs. Jos. S. Lovering & Co.

"Gents:—The Buck Mountain Coal Company will furnish you with 4,000 tons, 2,240 lbs. each, of their best quality egg coal, upon the conditions stated in your note of the 16th ult.; the first 1,000 tons at \$3.43 per ton, the balance, say 3,000 tons, at \$3.43 per ton, with the addition of any advance in freights and tolls which may take place on or before July 1, 1862, you paying any tax that may be imposed by the government. The coal delivered in the present month to be considered as a portion of the quantity contracted for.

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"This proposition, if accepted by you, will annul those contained in ours respectively of the 21st ultimo and 27th instant.

"Yours respectfully,

"W. P. JENKS, Pres't."

"Philadelphia, May 28, 1862.

'Mr. Wm. P. Jenks, Pres't.

"Dear Sir:—We have your favor of this date, and accept your offer therein contained, to furnish us with 4,000 tons of your egg coal. Yours truly,

"JOS. S. LOVERING & CO."

In June, 1862, there was a very disastrous flood on the Lehigh river, which carried away the works of the Lehigh Navigation Company. Shortly after, Mr. Jenks called on the plaintiffs, and informed them that by reason of this destruction of the navigation the defendants could not furnish the coal; that it was an act of God, and they were not responsible. The plaintiffs on the trial gave evidence of their purchase of 437 tons of the first 1,000 of other persons than the defendants, at prices above the contract price. The defendants, under exception, proved that the Lehigh Canal was the only outlet by which they could ship coal to market. They also proved the cost of transporting coal between the time of the freshet and July, 1862; also that the plaintiffs, June 10th, offer to receive "steamboat coal" from the defendants, instead of egg coal, and the declining of the offer by the defendants; also plaintiffs' letter of June 20th inquiring whether defendants intended to abandon their contract, and again proposing to take steamboat coal or Lehigh coal, with defendants' reply of the 21st, that they did not intend to abandon the contract, but adhere to it as far as in their power; also letter of plaintiffs of 24th, notifying defendants that they would supply their wants elsewhere, and hold them responsible for the loss; also letter of July 3d from plaintiffs, referring defendants to their counsel, Mr. Gibbons; letter July 10th, from Mr. Guillou, defendants' counsel, to Mr. Gibbons, informing him that the defendants would be prepared to deliver the monthly supply "for this and the remaining month of the contract time, * * * and under the increased rates of freights and tolls existing on and

before the 1st inst. (decreased since that date), the coal will cost your clients at least \$7 per ton.

"The act of God, which for a time stopped our supply of coal, bears in respect of the last 3,000 tons so onerously on your clients that we feel it would be a hardship to hold them to their purchase.

"Can not this whole matter be settled without litigation?"

Also from Mr. Guillon to plaintiffs, July 16th :

"Gents:—As you have made no calls upon the Buck Mountain Coal Company for the usual supply of coal for this month, I have been requested by my client to say to you that although they have been prevented by the act of God from delivering to you the balance of the first 1,000 tons under the contract, they are prepared and offer to deliver to you the usual quantity monthly in satisfaction of your claims for the remaining 3,000 tons, as you may call for it as heretofore.

"They will, of course, expect payment on the 1st of each month, covering increased freights and tolls.

"My letter of the 10th inst. was intended to elicit your orders, but none have been received. I am requested to write more definitely."

Also Mr. Gibbons to Mr. Guillon, that the correspondence between the parties had been closed, adding: "I understand your two letters to amount to an admission that the Buck Mountain Coal Company have on hand 3,000 tons of coal, which they purpose to deliver to us at \$7 per ton. This proposition is too absurd to merit notice."

Also, July 18th, from Mr. Guillon to Mr. Gibbons :

"My Dear Sir:—Your favor of yesterday's date just to hand. My letters referred to must, of course, speak for themselves; they are intended to ask that your clients should comply with their engagements to take coal at the rates agreed upon by them. The company will, and offer to, furnish it them as usual at their demand. You are in error in supposing that any admission has been intended that there are 3,000 tons on hand here at the present time; the 'two letters' were not intended to amount to any such admission, for the fact is otherwise."

Also letter of plaintiffs to defendants, October 20, 1863, referring to defendants' letter of June 10, 1862, and saying:

"As we understand that the navigation has been repaired so that coal can be furnished from your mines, we beg to inquire whether you are prepared to resume supplying us as promised in your letter above mentioned, or whether you prefer the question of your liability should be tested by a suit at law. We have not commenced any legal proceedings against you on your contract, because we have been content to afford you every reasonable opportunity to settle the matter without litigation."

And Mr. Jenks replied, October 23d :

"This company has no desire that the correspondence shall be re-opened, especially in view of your failure to adhere to your contract by first refusing to accept the offer contained in letters of 10th and 16th July, 1862, to deliver your coal as usual. Second, refusing to pay for the coal which you received in June, 1862, thus putting us to the necessity of suing you for its price.

"There was but one explanation of your course possible, viz.: that in view of the 'advance in freights and tolls,' you had found it to your interest to not accept the coal offered to you, and throw up your contract.

"With the single remark that you are entirely in error in the supposition that the 'navigation has been repaired,' etc., you will permit me without prejudice to pass over the rest of your letters in silence."

The defendants also proved that about July 1, 1862, they presented to plaintiffs a bill for 172 tons of coal delivered up to June 3, 1862, amounting to \$589.96, and that payment was declined.

The points of the parties and the answers of the court were as follows :

By the plaintiffs.

1. The freshet in the Lehigh river of June, 1862, and its results, as given in evidence, furnish no defense in law to the plaintiffs' claim.

Answer: "Not assented to."

2. The defendants were bound by their contract to have in their yard at Beach street the coal called for by the contract for delivery to the plaintiffs as required by them. And if the jury believe that they had no such coal there after the date of

the freshet, or failed to deliver it thereafter, when required, they are responsible in damages for such default.

"Answered in the general charge, and not assented to other than therein contained."

3. The measure of damages is the difference between the contract price and the market price of the coal in Philadelphia, after default in delivery by the defendants.

"Assented to."

4. There is no evidence of any advance in freight and tolls after the contract and on or before the 1st of July.

"I can not affirm this point. I think there is, but that is a fact for the jury."

By the defendants:

1. The contract between the parties read in evidence is to be understood as the mass of men would understand it; and is to be construed on the basis of circumstances about which the parties may be reasonably supposed to have contracted and not others they never thought of.

Answer: "Affirmed."

2. Where the performance of a contract to furnish an article becomes impossible by the act of God, and without any fault in the party bound to furnish it, the performance of the contract is excused.

Answer: "Affirmed."

3. If the jury are satisfied from the evidence that without any fault on the part of the Buck Mountain Coal Company their performance of the contract to deliver coal became impossible, then the defendants are not liable in damages for their failure during such time as the impossibility continued.

Answer: "Affirmed."

4. If the jury find that the defendants offered on the 10th July, 1862, to furnish to plaintiffs "their monthly supply for that month and the remaining months of the contract term," and the plaintiffs did not after such offer make any demand for coal or send their carts to plaintiffs' wharf for any, then the plaintiffs can have no claim for damages by reason of non-delivery after that date.

Answer: "I assent to this point as applicable to the three thousand. See general charge as to the one thousand."

5. If the jury find from the evidence that the plaintiffs

failed or refused early in July to pay the defendants "for the delivery of coal to them of the preceding month," then after such refusal the defendants were no longer bound to continue delivering coal in pursuance of the contract.

"Not assented to."

6. If the plaintiffs paid for coal, in and after June, a price less than they would have been obliged to pay under the contract, viz., \$3.43 per ton, with addition of the advance in freights and tolls, which had taken place prior to 1st July, then instead of being damaged they have been benefited, and in the assessment of damages allowance must be made for the loss thus avoided to the plaintiffs, and which adherence to their contract would have occasioned them.

Answer: "Not assented to."

THOMPSON, J., after reciting facts, charged:

"In view of these facts thus before us, for their existence is not so much disputed as their effect, I instruct you:

"1. That the contract in question was entered into with the defendants, miners and transporters of coal, to be delivered at a certain point or place designated. This was not a purchase of coal in market, but to be brought there, and it must be presumed the place from whence it was to be brought was known and in view of the parties, as well as the mode of transportation, where but one existed. If, therefore, the only medium of transporting the coal in quantities such as would be required in the present contract was destroyed by an inevitable flood, and the defendants were thereby prevented from fulfilling the contract, they are excused from compliance therewith during the time they were so prevented, but no longer. The act of God, as I have already informed you, injures no one. In other words, no one is entitled to recover damages on account of injuries therefrom.

"2. That the defendants may shelter themselves from liability to damages for non-delivery of coal during the time after the occurrence of the disaster and before they were able to resume its performance; measuring that time by the time of the offer to furnish coal, it was about one month.

"Was this unreasonable delay?"

"3. When the defendants offered to resume a compliance

of their contract, they had a right to insist on an advance in freight and tolls, if any advance occurred on or before July 1, 1862, from any cause which they could not control. The agreement to pay advance freight and tolls is general, and it applies to increase by the most usual and ordinary mode. Did an increase occur before the 1st July? If it did, and lasted up until performance or offer of performance by the defendants, they had a right to demand it. The offer to furnish coal, therefore, on the basis of the contract, including the advance freight and toll, if any existed, was, if made and refused, a sufficient compliance on the part of the defendants, and if the plaintiffs did not choose to take coal, the fault is theirs, and they can not recover damages if the offer was made in good faith. So in regard to the demand for the coal in 1863 by the plaintiffs. If they declined to take them after an offer made in July, 1862, which we have said was within the terms of the contract, so far as the demand for increased tolls and freight was concerned, their demand in 1863 goes for nothing. These offers to perform, if I recollect aright, refer exclusively to 3,000 tons, on which the advance in freights was applicable, and not to the residue of the first 1,000 tons, to which it did not apply.

"4. If the defendants are to be excused on account of the destruction occasioned by the flood, and tendered compliance as soon thereafter as possible, we have said that, as to the 3,000 tons, if that was the extent of the tender or offer on the terms of the contract as to advance freight and tolls, it will be a defense against the plaintiffs so far. But what excuse have they for non-delivery of the 437 tons undelivered of the first 1,000 tons to be delivered? No offer was made of that as I remember. It was to be delivered at \$3.43, no matter what increase in the expenses of transportation occurred. As the defendants asserted their determination to adhere to the contract they must perform or offer to perform it in all its parts. If I am right in supposing that there was no delivery or offer to deliver this coal, the plaintiffs will be entitled to damages for its non-delivery, and that will be the difference between the price agreed to be paid for it and what the plaintiffs had to pay for coal to supply its place, and interest.

"I am reminded that the contract was entire and not sepa-

able in performance. I have thought of this, and although it is not clear of difficulty, yet I am of opinion that the contract allows us to interpret it as separable for the purpose of performance. The first 1,000, as distinctly designated in the contract, is to be delivered at a fixed and certain price, under all circumstances of possible compliance—payments in the order fixed by the contract—and was to be monthly—and if an advance had taken place, as it did on the remainder of the coal the accounts in regard to the first 1,000 tons would have designated it as distinctly as if under a distinct contract.

“It so turned out that before the 1st of July an advance of freights and tolls did occur as to the 3,000; but did not, for it could not, as to the 1,000. As the defendants claimed to adhere to the contract, performance for these reasons, it seems to me, became separable, and that the case is not within the rule suggested by the plaintiffs’ counsel; and I think the justice of the case requires us so to treat it. Nothing was said by the plaintiffs about want of an offer of entire compliance by the defendants; the difficulty seems to have been in regard to the increased cost of coal on account of the advance in freights and tolls, they seeming to rely on the law as they assert it, that the act of God did not apply to excuse the performance of the contract, and could furnish no grounds for the advance in freights and tolls. Under the circumstances a recovery may be had for the deficiency in the performance as to this 437, if not for the 3,000 tons, it not having been delivered, if it was not offered to be delivered. I therefore charge you, on these views of this contract, that we think the plaintiff is entitled thus far to recover, so far at least as the law of the case is concerned; the facts are for you.

“I do not regard the plaintiffs’ case as improved by the offer to take steamboat coal under the circumstances, nor to accept Lehigh coal. The defendants might choose, as they did, to stand on their contract, and having done so, they must show performance or offer of performance, and we have, we think, commented on that part of the case sufficiently to render our views comprehensible by you.

“The defendants have no grounds for defeating the plaintiffs’ recovery, because of the failure to pay for the 172 tons remaining unpaid of the first 1,000 tons. They might have

made it a ground of rescission, but they waived this both by acts and declarations.

"Should you find for the plaintiffs, you may defalk from the damages the amount of the unpaid bill, and if it do not extinguish the damages incurred, return a verdict for the balance. If under the evidence you think the plaintiff is not entitled to damages (and I hardly think you can come to this conclusion), then the verdict will be for the defendants."

The verdict was for the plaintiffs for the difference between the contract price and the price paid by them on 437 tons.

The plaintiffs removed the case to the court in banc and there assigned for error:

That the court did not affirm their 1st, 2d and 4th points, and that, if the only medium of transporting the coal in quantities such as would be required in the present contract was destroyed by an inevitable flood, and the defendants were thereby prevented from fulfilling the contract, they were excused from compliance therewith during the time they were so prevented, but no longer.

That the defendants might shelter themselves from liability to damages for non-delivery of coal, during the time after the occurrence of the disaster, and before they were able to resume its performance.

That if the jury were satisfied from the evidence that without any fault on the part of the defendants their performance of the contract to deliver coal became impossible, then the defendants were not liable in damages for their failure during such time as the impossibility continued.

C. GIBBONS and G. M. WHARTON, for plaintiffs in error.

C. GUILLOT, for defendants in error.

The opinion of the court was delivered by READ, J.

The Buck Mountain Coal Company was incorporated by an Act of Assembly passed the 16th June, 1836, (Pamph. L. 803) for the purpose of mining of coal, and for transacting the usual business of companies engaged in the mining, transporting to market and selling of coal and the other products

of coal mines, and were subsequently authorized to construct a railroad with one or more tracks, to intersect the navigation of the Lehigh Coal and Navigation Company, which they completed in 1840, and established a depot at Rockport, where they broke and prepared their coal, and thence shipped it by the said navigation to market. The Lehigh Coal and Navigation works, therefore, became an indispensable and all important link in their chain of transportation; a fact well known to all their customers, as well as the quality of their coal and the mines from which it was taken. Of course all contracts made with the defendants were made in full view of these facts. On the 4th of June, 1862, an unprecedented freshet in the river Lehigh swept away all the upper Lehigh navigation works, which have never been restored above Mauch Chunk, and completely stopped all transportation of coal by the defendants to market.

The loss of life and property on the line of the river by this act of God was very large.

On the 28th May, 1862, the defendants contracted to deliver to plaintiffs 4,000 tons of their coal at their wharf in Philadelphia, from their mines, in such quantities as the plaintiffs might call for, at the price for the first 1,000 tons of \$3.43 per ton; the balance, say 3,000 tons, at \$3.43 per ton, with the addition of any advance in freights and tolls which may take place on or before July 1, 1862; the plaintiffs to pay any tax that may be imposed by the government. Payment to be made on the 1st of each month for the delivery of the preceding month. The coal delivered in the present month (May) to be considered as a portion of the quantity contracted for. The first 1,000 tons is settled by the verdict, and the only question is as to damages claimed by the plaintiffs for the non-delivery of the remaining 3,000 tons.

The defendants offered within a reasonable time after the freshet, to deliver their coal according to the terms of the contract, but this was declined. All the facts were submitted to the jury under the charge of the court, and the only question is, whether the instructions of the judge were correct.

The delivery of coal was to be at intervals during the period of a year, as it suited the plaintiffs, who had no accommodation for storing it in large quantities. The learned judge, after

stating the relations of the parties, says: "If, therefore, the only medium of transporting the coal in quantities, such as would be required in the present contract, was destroyed by an inevitable flood, and the defendants were thereby prevented from fulfilling the contract, they are excused from compliance therewith during the time they were so prevented, but no longer. That the defendants may shelter themselves from liability to damages for the non-delivery of coal during the time after the occurrence of the disaster, and before they were able to resume its performance. Measuring that time by the time of the offer to furnish coal, it was about one month. Was this unreasonable delay?" Certainly not in such a contract, and where the fulfillment to the exact letter was prevented by an act of God, over which they could have no possible control, and which they could not have in any way provided against, as they were not the owners of the navigation works. "When the defendants offered to resume a compliance of their contract, they had a right to insist on advance on freight and tolls, if any advance occurred on or before July 1, 1862, from any cause which they could not control. The agreement to pay advance freight and tolls is general, and it applies to increase by the most usual and ordinary mode. Did an increase occur before the first of July? If it did, and lasted until performance or offer of performance by the defendants, they had a right to demand it."

"The offer to furnish coal, therefore, on the basis of the contract, including the advance freight and tolls, if any existed, was, *if made and refused*, a sufficient compliance on the part of the defendants, and if the plaintiffs did not choose to take coal, the fault is theirs, and they can not recover damages, if the offer was made in good faith."

This is the whole case before us; and we perceive no error in the rulings of the learned judge, which are very moderate in a case where the act of God should properly leave the parties without any remedy on either side.

In the case of *Appleby v. Myers*, in the Exchequer Chamber on 21st June last (L. R. 2 C. P. 651), where the plaintiff contracted with the defendant to supply and put up on the defendant's premises an engine and certain machinery, for which he was to be paid a lump sum on completion; and when a portion

of the machinery was put up and fixed, but before the whole was completed, an accidental fire broke out on the defendant's premises, which destroyed the premises and so much of the work as the plaintiff had done upon them, and rendered the further performance of the contract impossible, it was held that the plaintiff was not entitled to recover the whole, nor any portion of the contract price.

"We think," said Justice Blackburn, "that when, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, and excusing both from further performance of the contract, but giving a cause of action to neither."

The verdict of the jury effects the same result in this case, and as the plaintiffs have failed in sustaining their specifications of error—

The judgment is affirmed.

HASSON ET AL. V. THE OIL CREEK AND ALLEGHENY RIVER RAILROAD CO.

(8 Phila. 556. Common Pleas of Venango County, Pa., 1871.)

Pipe line under roadbed. A railroad does not take the land condemned for its use in fee. This remains to the original owner, who may lawfully enter upon the roadbed and lay a pipe line for the carriage of oil under the railroad.

Injunction. An interference with the exercise of such right may be prevented by injunction.

In equity. Motion for preliminary injunction.

C. HEYDRICK, Esq., for plaintiffs.

CROSBY & TAYLOR, Esqs., for defendants.

TRUNKY, P. J.

The plaintiffs are seized in fee of a tract of land over which the Oil Creek and Allegheny River Railway has been con-

structed, under the provisions of the act of 19th February, 1849. The bill avers that the necessities of their business require them to convey oil across the track of said railway, and that economy and safety require that said oil should be conveyed through an underground pipe or conduit, rather than upon wagons and carts over the ordinary causeways; and that many such pipes have been laid by the owners of lands under railways with entire safety. It further avers that, on November 18, 1870, they commenced to construct such pipe or conduit for the conveyance of oil upon their said land, under the track of said railway, in such manner as neither to interrupt nor endanger the business of defendants, or the lives of their passengers and servants, by driving or forcing a metallic pipe of not more than three inches exterior diameter through the ground, not less than two feet beneath the track of the railway; that defendants forcibly prevented them from completing the work, and threaten and intend to forcibly prevent it. Therefore they pray relief.

Without a particular notice of the purport of each affidavit, it seems certain, as a conclusion from the whole, that the driving of the pipe in a proper manner under the track will not imperil the safety of defendant's railway or of their passengers and workmen. At the first hearing the defendants were enjoined from hindering the laying of the pipe; and the plaintiffs restricted from permitting any connection, so that any oil produced on other lands could be conveyed through the pipe. A motion was then made to strike out this restriction, which has been fully argued.

Some questions were discussed by counsel as to monopolies, and the right in defendants to carry the oil, even for short distances, without competition of pipe companies having no charters; but these will not now be considered. Should any person, natural or artificial, unlawfully engage in carrying oil, the law provides a remedy; at present it is sufficient to determine the plaintiffs' rights in their own land.

The real question is, may the plaintiffs lawfully do the act proposed if it can be done without peril and inconvenience to the defendants and the public? They can not, if the position of the company be correct, that they have the right to the exclusive occupancy of the land taken for their road.

If this be so the plaintiffs can not convey oil or water across the track at any point other than at the causeways provided for wagons and other vehicles; nor can they do any act whatever on the land appropriated, save to cross at these causeways. Conceding the defendants have lawfully acquired the right of way, they have no estate in fee simple in plaintiff's land, but only the right to use the land taken for their purposes. They are not entitled to cultivate, or dig for stone or minerals in the land beyond what is necessary for their purposes in construction: 1 Redfield on Railways, Sections 69, 1, 2.

Justice Agnew says: "Unlike the laws under which the State constructed her public works, and by virtue of which she took a fee simple estate in the land, the act of 1849 conveys only a right to survey and locate the route for a railroad, and to enter into and upon, and occupy all land on which its railroad depots, etc., may be located." "The character of the interest of the corporation in the land so taken and used for railroad purposes is thus clearly set forth in the law itself, but it has also received judicial recognition in numerous cases. It is an easement merely upon the land, a right of way or passage, with such an occupancy as is necessary to give this right its effect; this is in constructing, repairing and using the works adapted to the purpose of passage." *Western Penna. R. R. v. Johnston*, 9 P. F. Smith, 290.

"The railroad corporation has no higher, or more exclusive, or more extensive right to lands taken, than the public and public authorities have by the laying out of such lands as a highway." "By the theory as well as the letter of the law, the taking in both cases is for the public use, and that use is no more inconsistent with the continuance of the fee in the original owner in the case of a railroad than in that of a highway." *Blake v. Rich*, 34 N. H. 285.

Under the general railroad law, and most of our railroad charters, provision is made only for the acquisition of a right of way, as is also in the acts of assembly respecting ordinary highways. The proprietor of the land retains his exclusive right to all its mines, quarries, springs of water, timber and earth, for every purpose not incompatible with the right of way." *Lyon v. Gormley*, 3 P. F. Smith, 261. In *Searle v. Lack. & Bloomsburg R. R.*, 9 Casey, 57, the court held, that the owner of coal land, taken by the company should be al-

lowed the full value of the land, as coal land, though they get no title to the coal further than is needed to support the surface. But the owner of the land is not entitled to recover the value of the minerals beneath the surface. In speaking of the rights of a land owner over which the Erie Extension Canal was constructed, Gibson C. J., said: "He might do any act of ownership consistent with the public franchise, reserved from the beginning. He might lay pipes or open a quarry under the canal, or enter upon any other enjoyment of the soil that would not interfere with the works or impede the navigation." *Dobbins v. Brown*, 12 Pa. St. 75. From the cases cited it is clear that the modern decisions, as did the more ancient, maintain the principle that when land is appropriated to public use, whether for a canal, railroad, turnpike, or a common road, the fee remains in the former owner, who may use it for every purpose not incompatible with the right of way. The owner of the fee may do many things on or under the surface of a turnpike or country road, which would be incompatible with the rights of a railroad or canal company. In one case he might quarry or mine with safety, when in the other such act would be dangerous to life and property. He may use the surface of a country road with safety to all; but it is difficult to imagine a case where he can use the surface of a railway without danger, annoyance or inconvenience. Hence it has been held in several States that the right of a company to the exclusive possession of the land taken differs very essentially from that of the public in the land taken for a common highway. That a railway company, from the nature of their operations, for the security of passengers, workmen and the enjoyment of the road, have the right to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy, in any mode and for any purpose: *Redfield's Amer. R. R. Cases*, 260; *Junction R. R. Co. v. Boyd*, 8 Phila. 224.

The right of occupancy of a railway company is said to be practically exclusive. As to the surface of the land appropriated, this may be necessary for their purposes. In few cases would the owner of the fee be allowed to quarry or mine. Whatever would tend to endanger safety in the use of the road would be incompatible with the rights of the company. Still the proprietor continues the owner of the miner-

als, stone, earth and oil, and if he can reach and remove them with safety, he may do so, as if they were on or under an ordinary road. For the purpose of drainage, or any other lawful purpose, the owner in fee may lay a pipe under a railroad where he can do so without disturbance of the easement, as freely as he could lay a pipe or open a quarry under a canal. When it is demonstrated that the act of the owner of the soil is in no way injurious or prejudicial to the enjoyment of the right of passage, the act is lawful. If it be true that the security of passengers, workmen and property, demand an exclusive occupancy by a railway company of the surface of the lands appropriated, it does not follow that the owner of the soil is divested of all his rights. They may have that right assured; they have the right to all above and below the surface necessary for the proper enjoyment of their easement; but this does not prevent the owner entering upon any enjoyment of the soil that will not interfere with the use of the way, or tend to lessen its safety. The rights of landowners should not be frittered away *in toto*, because of the greater care required in using a railway than a turnpike. If the law, as it has stood for centuries, still recognizes the owner's enjoyment, subject only to the easement, let him not be cheated by a judicial construction, giving the owner of the easement the benefit of an absolute fee simple estate. Before this is done, the rule for estimating damages for lands appropriated ought to be so far changed as to compensate for the injury done in running through the track, absolutely taking a strip of land, extending downward and upward from the center of the earth to the heavens. When such an appropriation shall be authorized by law, and the owner paid for it, he will have less reason to complain when hindered in conducting oil or water in pipes across a railway.

The courts of this State have not yet held that the owner of land in fee simple holds as a naked trustee, for the sole and exclusive use of those who, under her laws, have acquired but a right of passage. By the rule of the common law, so often recognized and repeated in the decisions of our courts, the proprietor of the land retains his exclusive right to its use for every purpose consistent with the public franchise, and may carry water, or oil, in pipes, under the highway.

Under the facts, believing the plaintiffs have a clear right

to drive a pipe under the railway track for the convenience of their lawful business, in such manner as in no wise to imperil the safety of person or property upon the railway, they ought not to be hindered in doing so. It is not denied that the defendants hindered them and threatened to prevent the laying of the pipe. The special injunction should have been awarded without the restriction, and will be modified accordingly.

IN RE THE POUGHKEEPSIE AND EASTERN RAILROAD
Co.

(63 Barbour, 151. Supreme Court of N. Y., 3rd Dep't., 1872.)

¹ **Condemnation of mining railroad by passenger line—Damages to ore bed.** Where a railroad attempted to condemn as part of its roadbed a part of a shorter railroad, owned and used by the owner of an iron ore bed as an appurtenance to such ore bed: *Held*, that confining the damages to the actual value of the land taken and the ties and track as at present laid down, was not that just compensation intended by law, and that if the ore bed and the remaining section of its railroad not taken were depreciated in value by such taking, the owner must be allowed damages for such depreciation.

Appeal from the appraisal of commissioners appointed in proceedings under the statute laws of 1850, Ch. 139, by a railroad company, to acquire the title to real estate.

J. W. EDMONDS, for the claimant.

R. F. WILKINSON, for the railroad company.

By the Court: P. POTTER, J.

The claimant, Palmer, was the owner of a railroad of four or five miles in length, leading from and appurtenant to an iron ore bed, and extending from said ore bed to a place called Boston Corners, in the county of Columbia, at a place where it terminates, or connects with the Harlem railroad. The respondents have constructed their railroad extending from Poughkeepsie to the Connecticut line, at or near Boston Cor-

¹ *East St. Louis C. R'y v. E. St. L. U. R'y*, 108 Ill. 265.

ners; and, at a point about two and a half miles from Boston Corners they intersect or strike the railroad of the appellant, and from thence to Boston Corners, have located upon, and propose to take, the appellant's railroad, bed, embankment, excavations, rails and ties; and the proceedings before us are an appeal from the appraisal of commissioners appointed by proceedings under the statute: Laws of 1850, Ch. 139, §§ 13, 14, 18. Though various questions were raised against the legality of the proceedings, the ground upon which the court have been moved to reverse the appraisal is the apparent injustice of the appraisal. At one terminus of the appellant's railroad he owns a valuable iron ore bed, from which 20,000 tons of ore can be taken annually. The engineer of the respondents testified, on the appraisal, among other things, as follows: "We could have made our line without touching Palmer's, but we used Palmer's because it was for the interest of our railroad." "To take this road would be a great saving to us of time in building our road. This is the principal reason for taking it." "Palmer has now, by means of his railroad, access from his mine to the Harlem railroad. He will not have access, after the Poughkeepsie and Eastern road is built, except by highway and by our railroad. The entire length of Palmer's railroad is $4\frac{1}{2}$ miles. We take 2.47 miles. Palmer can build another road parallel with the present one, for the use of his mine. To build and complete such new road would cost \$12,000 a mile."

One Norton, on the part of the appellant, testified, "that with the present facilities of working the mine there would be a profit of \$1 a ton," and he says he made "an offer of a royalty of 75 cents a ton to the owner. Without the facilities of railroad transportation the mine would be worth nothing." There was conflicting evidence of the value of the property, and the commissioners certify to their own view of the property. But in their allowance of damages they name but two items, to wit: The value of the land taken by the company in its present condition, including grading done thereon, \$9,451; value of iron and ties constituting track as at present laid down, \$13,049; total, \$22,500.

This finding excludes the idea of damages arising from depreciation in value of that part of the appellant's railroad not

taken; also from any possible depreciation to the ore bed by cutting off existing accommodations for transporting ore; also from delay while the respondents are using his road, and in the time required to construct another road by appellant, and other considerations, from which he must be damaged.

Confining the damages, as these appraisers have, to the actual value of the land taken and to the actual value of the ties and track as at present laid down, it is not, in our opinion, that just compensation intended by the constitution and the statute for all the injury that the taking of the property for the purpose intended will cause the land owner, and for all the injuries which he will suffer. Such taking, it is clear, must necessarily affect injuriously the remainder of the appellant's railroad which is not taken. It is clearly shown that he can not use that without constructing another track from it to his ore bed, and this will cost him far more (as the evidence discloses) than is allowed him for the portion taken. It is clear that his ore bed must be diminished in value by the taking this section of his railroad which is appurtenant to it, and for these injuries no damages have been awarded. The legislature surely did not intend that these injuries should be borne by the land owner. If the appellant's ore bed and the remaining section of his railroad are depreciated by this taking, then he should have been allowed for such depreciation. This has not been done. I think, therefore, that for this reason alone, without passing upon the other objections, the determination and report of the commissioners should be set aside, the commissioners discharged, and a new commission appointed to appraise all the damages the appellant will sustain, with \$10 costs.

Ordered accordingly.

MINE HILL AND SCHUYLKILL HAVEN RAILROAD CO.
V. LIPPINCOTT.

(86 Pennsylvania State, 468. S. preme Court, 1878.)

Suit in name of landlord for use of tenant. Where a railroad company has the right of way over mining lands, and covenants with the owner thereof that upon notice it will change its location, or permit the coal underneath the way to be mined, a tenant of such owner—the terms of whose lease give him the right to mine all the coal in the land demised—may sue in the name of the landlord for breach of such covenant.

Breach of covenant to remove railroad. If a railroad company covenants with the owner of land, upon notice, to remove the railroad to another location on the same land, so as to permit the coal thereunder to be mined, but upon notice refuses to perform its covenant, a specific performance can not be compelled, but the railroad will be liable in damages for the breach of its covenant.

Idem—Measure of damages—Apportionment of damages between landlord and tenant. The measure of damages under such circumstances is the value of the coal left standing, so as not to let down the surface, and a verdict for these damages, *in solido*, may be apportioned by the jury between the landlord and the tenant.

Right to damages does not pass by assignment of lease. The tenant under the terms of such a lease does not part with his right to damages for the breach of covenant on the part of the railroad, because he had sold “all of his right, title and interest” in the colliery.

Release by landlord of right to damages does not affect right of tenant. The fact that the landlord, after suit commenced by the tenant, released all his right under his contract with the railroad company, would not affect the right of the tenant, but would reduce that portion of the verdict which in the apportionment by the jury was allowed to the landlord.

Removal of coal pillars. Where a lessee is bound to take out *all* the coal, he has the right to remove the pillars usually left for support.

Error to the Court of Common Pleas of Schuylkill County.

Covenant by Joshua Lippincott, James Dundas Lippincott, executors of James Dundas, deceased, and the Philadelphia Trust, Safe Deposit and Insurance Company, administrator *d. n. c. t. a.*, of William Richardson, deceased, for the use of William Verner, against the Mine Hill and Schuylkill Haven Railroad Company. The Ashland extension of the Mine Hill and Schuylkill Haven Railroad, which was authorized by the act of March 18, 1852, Pamph. L. 166, was built and in opera-

¹ *Bagnall v. London E'y*, 5 M. R. 366.

tion in 1855. It crossed, near the center, a tract of land owned by Dundas and Richardson, called the Catharine Groh tracts, which consisted of about four hundred acres, situated in Cass township, in Schuylkill county.

On the 20th of February, 1855, the following agreement was entered into by the parties thereto :

It is agreed between the Mine Hill and Schuylkill Haven Railroad Company, of the first part, and James Dundas and William Richardson, of the second part, owners of all that tract of land situated in Cass township, Schuylkill county, containing upward of four hundred acres, warranted in the name of Catharine Groh, conveyed by sundry conveyances to the party of the second part.

1. The party of the second part, owners of the real estate, hereby release the party of the first part of and from all claims and demands for damages now recoverable by reason of the use and occupation of the surface of the ground by the party of the first part, for the construction of their extended railroad as now built across the Broad Mountain to Ashland ; and the right of way over and upon the said premises along the line thereof, not exceeding in width two and one-half rods on each side, measuring from the center of the graded surface of the road. And the said party of the second part further agrees that the said party of the first part may, at convenient water stations, to be by them erected, use so much of the water for locomotive engines as may not be required for mining, steam engines, or domestic purposes, by the tenants or occupants of the land of the said party of the second part.

2. The party of the first part agree that all the coal in the land over which the said railroad passes may be mined by the tenants of the party of the second part, as though the said railroad had not been constructed thereon.

3. That when, or so soon as the tenants of the said party of the second part are about to mine coal under, or so near to the said railroad that the mining may reasonably be expected to affect the surface of the ground, then the said party of the second part, or their agents, or the said tenants, shall give notice thereof in writing to the said party of the first part, or their agents ; and the party of the first part, upon receipt of such written notice by the tenant or any other person author-

ized by the party of the second part, will take such measures as to the said party of the first part may seem proper to protect their road from all damages by reason of the mining by the tenants of the party of the second part, and so adjust, secure and maintain the same that the said party of the second part may, by their tenants, be at liberty to mine and remove the coal to the same extent to which it could be done if the said railroad had not been built.

4. That upon receiving such notice, all the measures necessary for the protection of the said railroad as above stated, and so that the liberty to mine said coal shall not be interfered with, shall be taken at the expense of the said party of the first part, and they shall have the right to enter the mines with the view to examine the condition thereof from time to time, not interfering with the mining thereof.

5. That if upon such mining or removal it shall not be found reasonably convenient to protect or preserve the said railroad in its present position and location, then it shall be lawful for the party of the first part, and they shall have the right to place or relay the same upon the nearest adjacent lands of the party of the second part suitable for such purposes, not affecting thereby any improvements made at the time of such removal; and the party of the first part shall enjoy upon the route so taken, and without claim for right of way, the same rights and privileges and under the same restrictions as are herein contained with respect to the line now occupied by them.

6. The party of the first part hereby indemnify the party of the second part, their agents and servants, from all loss or damage of any nature whatsoever which can or may happen to said railroad, or to any person or property whatsoever, using or being conveyed thereupon, by reason of any defect or imperfection in said railroad occasioned by the mining and removing of said coal; but the same shall be wholly borne by the party of the first part.

For the faithful performance of the covenants and agreements herein contained the said parties do bind themselves each to the other, their respective successors and assigns.

Prior to the construction of this extension, Dundas and Richardson had leased the coal veins in this tract to John Stanton

and others, who worked the same for a considerable period of time before and after the construction of the said extension, and took out large quantities of coal.

Their successors were Andrew McFarland and Thomas Verner (a brother of the said William Verner), who were in possession and working this colliery at the time of the execution of the agreement of 20th February, 1855, and mining coal from under the said railroad, leaving pillars for its support, and also for the support of the mines.

These tenants were sold out by the sheriff, and the lease purchased by one William Morton, who was recognized by Dundas and Richardson as their tenant. After being in possession of the colliery about nine months he surrendered his lease and premises to his landlords, who, on the 11th September, 1858, by articles of agreement, made a lease to William Verner, the party for whose use this suit was brought.

This lease, among others, contained the following recitals:

"Whereas, the said parties of the first part are the owners of a tract of coal land, known as the 'Catharine Groh Tract,' of the county of Schuylkill, and that part of the said tract and veins of coal thereon constituting the Glen Carbon Colliery had been by them leased to Andrew McFarland and Thomas Verner, brother of the said William, whose rights and term were subsequently sold to a certain William Morton, who failed to conduct the same in accordance with the terms of their lease, the same was sold to and surrendered to them, the said parties of the first part; and it is now proposed to lease the same colliery to the said William Verner, subject to the payment by him of the back rents and debts due from the said William Morton to them, the said parties of the first part. It is therefore covenanted and agreed that the said parties of the first part hereby lease to the party of the second part the said colliery and the right to mine coal from the south vein in which the slope now is, the Daniel and Jugular veins, north, and the three veins of coal next south of the said south vein of coal, for the full end and term of five years from and after the first day of September, instant.

"And the said party of the first part hereby leases with the said veins of coal and colliery aforesaid, the use of all the railroads and fixtures of every description belonging to the

said colliery, and the twenty-two blocks of miners' houses and the dwelling-house and store, stabling, etc., at the said colliery, belonging to them: together with all of the horses, mules, drift and other cars, wagons and tools and personal property of every description now at the mines; to have the right to use and enjoy the same for the purpose of conducting the said colliery for the full end and term aforesaid; to be kept in good order and condition by the party of the second part during the term aforesaid, natural wear and tear only excepted. And in consideration of the lease of the colliery, fixtures, railroads, houses and personal property aforesaid, the said party of the second part covenants and agrees to pay to the parties of the first part, at the end of every month during the said term, thirty-two cents per ton for every ton of coal mined and shipped from the mines, of any size above the size of chestnut coal, and for chestnut coal the sum of twelve and a half cents per ton, scale weight, on the respective railroads, on which the same may pass, but at no time shall the amount of the chestnut coal exceed ten per cent. of the whole amount of coal mined and shipped. And it is further agreed between the parties that the relation of landlords and tenant shall exist between them, and that the parties of the first part shall have the right to issue their warrant of distress, and seize and take any property of the party of the second part found anywhere upon the said 'Catharine Groh Tract' of coal land in payment of any back rent due and unpaid, including the said extra ten cents per ton, to be paid in discharge of the debts aforesaid.

"And it is further agreed between the said parties that the said party of the second part shall in every year during the said term pay rent, which shall at the least be equivalent to the rent on thirty thousand tons of coal, and on as much more as he may reasonably mine by an energetic and diligent working of the said colliery. And the said party of the second part shall at all times work the said mines, timber and support the gangways, and do all other acts appertaining to the working of the same in the most approved manner, so as to facilitate the taking out of all of the coal in the different veins with the least possible waste, and to see and detect any imperfect working of the same. The parties of the first part, by their agents or mine inspectors, shall at all times have the right to go into every part of the said colliery.

"And it is further agreed between the said parties that the working of the said veins of coal here leased are not to be worked in such manner as to interfere with the working of any other colliery now leased by the parties of the first part to any other parties on the same tract of land; but is expressly granted, subject to the rights of all other parties, as they now exist, on the same tract of land.

"And it is further agreed between the said parties that this term, or any interest therein, is not to be assigned or transferred by the said party of the second part, without the written consent of the parties of the first part."

Under this lease Verner took possession of the colliery and worked the coal veins, mining in the usual manner. On the day of its date he sent the following notice to the superintendent of the railroad company.

"Glen Carbon, 25th Nov. 1859.

R. A. WILDER, Esq. :

Dear Sir : I intend to commence to mine coal in the Back or Daniel vein of my colliery, on Monday, 28th inst., and as the mining of the coal may interfere with your railroad, you will please keep a watch on it, as the road is on the crop of the vein.

Yours respectfully,

WILLIAM VERNER."

Mr. Wilder testifies that between 1859 and 1865 "Mr. Verner often told me he intended to remove the coal, and that we should take measures to protect the road. I always replied to him that it would be exceedingly dangerous to the road to have the coal removed while the road was used, owing to the peculiar situation of the road to the outcrop, and that if he attempted to remove it until some plan was sanctioned by the company, I should have all parties engaged in it arrested. The company never made any attempt to work for the purpose of changing the road, but we made a thorough examination to see if it was practicable to make a re-location at that point; we found it impracticable, and therefore did not make any. * * The cost of bridges would be worth more than the coal." In 1864, the Philadelphia and Reading Railroad Company having become the lessees of the Mine Hill and Schuylkill Haven Railroad Company, instituted proceedings against

Verner to prevent his mining so as to endanger the safety of the road, and an injunction was obtained against him, which has never been dissolved.

On the 25th April, 1870, on motion, a rule was granted by the court on plaintiffs' counsel to file their warrant of attorney in this case, before proceeding further therein.

On 23d May, 1870, warrant of attorney from William Verner *only* was filed.

On 5th June, 1870, the affidavit of George J. Richardson was filed, setting forth that he was one of the executors of William Richardson, deceased, who was one of the plaintiffs in this suit. That neither he, nor as he believes, his co-executor, nor the said William Richardson, in his lifetime, ever authorized William Verner, or any person for him, to bring this suit. And on the 9th September, 1870, the court discharged this rule.

At the trial the following paper was put in evidence:

"I have this day sold my right, title and interest in the Glen Carbon Colliery to Geo. S. Patterson & Brother for sixty thousand dollars; two thousand dollars which I have this day received; four thousand more to be paid on Monday, the 26th of September; twenty-six thousand to be paid on the 1st October, 1864, and the balance in thirty days from the first of October, 1864. It is agreed that if the payments are not made as above the money paid will be forfeited.

WM. VERNER,

GEO. S. PATTERSON & BRO.

Philadelphia, September 21, 1864."

And the following receipt:

"PHILADELPHIA, September 21, 1874.

Received of George S. Patterson & Brother two thousand dollars on account of my interest in the Glen Carbon Colliery, together with the following personal property and real estate: Eleven mules, three horses, two carriages, one sulky, harness, wagons for hauling lumber, frame stable, carriage house, carpenter and smith shop, tools for the same, forty-six drift wagons, three iron dirt trucks, screws and tools for the same, two large wire ropes, from four to five miles of T railroad iron, coal mined in mines, four houses, one fire proof safe, lot of

timber for mining purposes, three iron air stacks, the timber right of eighty acres of land adjoining the property, breaker and engine belting, and all belonging to the breaker.

\$2,000.

WM. VERNER."

In relation to these papers George S. Patterson testified: "We thought we had purchased all of Mr. Verner's personal property and interest in the colliery; but we knew that we did not purchase any lease from Verner; we thought we had acquired all Mr. Verner's rights; I don't remember whether those pillars were mentioned in that lease or not; we did not buy any claim that Mr. Verner had against the Mine Hill and Schuylkill Haven Railroad Company for damages; at the time we purchased it was not impossible, but it would not have paid us to take out the pillars in the Crosby vein, if we had the right; the gangway was down at some places; I think Mr. Verner and my brother Edward were present at the time when I said to Mr. Verner that we did not want to buy a lawsuit."

With the evidence produced by the defendants was an assignment of the surviving executors of Richardson and Lippincott, deceased, to the Philadelphia and Reading Coal and Iron Company, of all their rights under the original agreement with the company.

The verdict was for plaintiffs for \$52,088, "of which \$8,334.33 is for rent." A rule to set aside the verdict and enter judgment for the defendants, *non obstante veredicto*, was subsequently discharged. The defendants then took this writ.

WILLIAM B. WELLS, JOHN W. RYAN and BENJAMIN W. CUMMING, for plaintiff in error.

G. E. FARQUHAR, F. W. HUGHES, and EDWARD OWEN PERRY, for defendants in error.

PER CURIAM.

The effect of the agreement of 20th February, 1855, between Dundas and Richardson, the land owners, and the Mine Hill and Schuylkill Haven Railroad Co., was to enable the former and their tenants to mine all the coal and let down the

surface, just as if no railroad lay upon this surface. The railroad company was bound, on notice, to take care of its railroad, or remove it to another location on the same land. This removal was merely contractual, involving no exercise of the power of eminent domain, and is not within the decisions holding the power, when once exercised, as gone. The ability of the company to perform either alternative was a matter wholly within its own knowledge, when for a valuable consideration it entered into the contract. The contract yielded to the land owners the right of subjacent support of the railroad, and the right to take all the coal underneath. But the railroad being a creation of law for a public purpose, the public right required the subjacent support to remain, if the railroad company refused to perform its contract. The contract thus concerning the public as well as the company, specific performance could not be compelled, and refusal of the company converted the right of the land owners into a right of action for damages under the covenant. The damages necessarily extended to the value of the coal in place for the whole was lost to them by the refusal of the company to protect or remove its railroad, and the necessity for the subjacent support. This loss is the same for the whole of the coal in place, whether it arises from the necessity of leaving the pillars as a support of the railroad, or from a conversion of title by payment of the damages. The cause of action therefore arose when the company refused to perform its covenant.

As to Verner, the tenant, there is then no difficulty. He is entitled for his own use to that proportion of the damages to be recovered by the owners of the land, which his lease conveyed under his right to mine—to wit, to remove, sell, convert and retain after payment of his rent. The verdict is *in solido* for the entire damages, and not two verdicts—one for the lessors, and the other for the tenant. The proportions found by the jury were but for convenient distribution, a thing often done where different rights in the same subject exist. The suit was by the covenantees against the covenantors, and the recovery for the entire value of the coal in place. The right of Verner, as use plaintiff, under his lease, is also clear. His lease was of an old colliery, consisting of several veins, some of which were worked out, leaving only the pillars. No reser-

vation was made as to the extent of his right to mine; but on the contrary his lease bound him to work the mines, "and do all other acts appertaining to the working of the same in the most approved manner, so as to facilitate the taking out of *all* the coal in the *different* veins with the *least possible waste*." This lease must be interpreted in view of the right of the owners, under their contract of 20th February, 1855, to take out all the coal and let down the surface, the condition of the old workings where pillars only were left, different veins referred to, covering old and new workings, and the requirement to take out all the coal with the least possible waste. Verner therefore became entitled to the tenant's share of the pillars in the old workings, and was bound to remove them for the advantage of the lessors. He then was entitled to give the requisite notice to the railroad company to protect or remove its road. He was rightfully a use party, and had an interest his lessors could not revoke or transfer.

This answers also the alleged effect of the release of Richardson to the railroad company in 1872, during the pendency of this action, which was commenced in 1865 against the railroad company. The railroad company had notice of his lease, and could not take a release in the face of the *lis pendens* for the breach of its covenant.

It is alleged, however, that William Verner sold his "right, title and interest in the Glen Carbon Colliery," to George S. Patterson and Brother, on the 21st September, 1864, which operated to transfer his right of action. But there is nothing in the writing purporting to convey a right of action for damages already awarded. It purports to pass his title or interest in the colliery, and the other paper of September 21, 1864, passes also the personal property in use in and about the mines. George S. Patterson, the assignee, testifies also that he purchased only the interest of Verner in the colliery and his personal property. He does not remember that the pillars were mentioned, and did not purchase any claim that Verner had against the railroad company; did not want to buy a lawsuit, and did not remember whether Verner stated he had a claim for damages against the company for the pillars. Neither the writing nor the testimony shows a sale of Verner's right of action. None therefore passed to Patterson and Brother. The

right to take the pillars did not vest in them, for the same refusal of the railroad company which converted the right to take the pillars into a claim for damages under the covenant, took from Verner the power to pass title to the pillars to his assignee. The pillars remained *ex necessitate* under the higher right of the State, for the support of the railroad; the right to retain them being conclusively fixed by the refusal of the railroad company to permit their removal. This refusal converted the right to mine them into a right of action under the covenant, when Verner gave his notice in 1859, repeated in 1864, before his assignment.

The case has no analogy to a conversion of chattels by recovery of the value. The pillars are part of the realty, and were fixed in their condition by the exercise of the right of eminent domain by authority of the State, as a necessity for continued support beyond the power of the landlords or their tenant to remove them. It was only the contract which conferred the right to mine them, and on the refusal to perform it neither Verner nor his assignee could remove them. The right of action for the damages therefore vested immediately in the covenantees for the use of their tenant. This right of action did not pass by Verner's assignment of the colliery, and if the pillars can not be mined by his assignee, as we have shown, the injury is remediless, unless Verner can maintain his action in the name of his lessors, the covenantees. Hence, to say that the right to pillars passed to the Pattersons, the assignees of Verner, which could be mined by no one, is illogical and unsound; and to say that possibly at some future day the railroad track may be removed, and the pillars be mined, is to deny to Verner a right he clearly obtained under his lease, and the breach of the covenant on a pretext, not only illusory, but dependent on the act of the very party whose breach of covenant is the cause of injury to Verner. This in effect would be a denial of justice, on a theory of the merest shadow of a possibility.

But so far as the landlords, Dundas and Richardson, are beneficially interested in the verdict, it is clear that their interest is bound by the release. Hence the portion of the verdict given for *rent* can not be recovered. The separation of the damages in the verdict enables us to modify instead of reversing the judgment. The sum of \$8,334.33 is therefore struck out of

the verdict, and judgment is now entered for the residue, to wit: \$43,753.53 for the use of William Verner—at which sum the judgment is now affirmed.

SHARSWOOD and PAXSON, JJ., dissent from the judgment, not from its modification.

1. Railway company may have injunction to restrain owner of minerals from mining for same to the injury of the right of way: *North Eastern R. R. v. Crossland*, 2 Johns. & Hem. 565.

2. Conveyance of land to a railway company, with reservation of minerals. Right of the company to subjacent and adjacent support: *Caledonian R. R. v. Sprot*, 2 Macq. 449.

3. *Quære*, whether under a reservation of a sufficient way-leave to and from certain mines, the owner had a right to make a railway for carrying coals, and to fence it so as to exclude the owner of the soil: *Dand v. Kingscote*, 6 M. & W. 174.

4. A mining company holding a special charter, wherein is conferred the right of building a railroad, with the privilege reserved to others to send their products over the same, is not bound to operate such road after its own interests cease to require it: *Montell v. Cons. Coal Co.*, 45 Md. 16.

5. Canal company having power to condemn right of way is not bound to take shortest route, but may take the most expedient route for a railway to its canal: *Richards v. Richards*, 1 Johns. (Eng.) 255.

6. Extra freight on coals, recovered as paid under moral duress: *Chicago Co. v. Chicago Co.*, 2 M. R. 634; *Peters v. R. R. Co.*, 42 Ohio St. 275; 51 Am. R. 814; *Hays v. Penn. Co.*, 12 Fed. 309.

7. Condemnation of railroad bed for working mines: *Brown v. Corey*, 5 M. R. 368; *Edgewood Co.'s App.*, 5 M. R. 406. Such acts strictly construed: *Lance's App.*, 55 Pa. St. 16.

8. Coal taken in grading roadbed over land condemned belongs to the owner of the freehold: *Lyon v. Gormley*, 5 M. R. 383.

9. Mines must be worked so as not to interfere with railroad above: but one compensation in such cases; and this although the item in question had been overlooked: *Rex v. Leeds Ry.*, 3 Ad. & El. 683.

10. As to when the estate of the company under the railroad grants accrues, see *Broder v. Natoma Co.*, 5 M. R. 33.

11. A mining occupant's claim on the 400-foot grant to the Central Pacific Railroad is defeated by the exercise of the power of the government in conveying land to the company: *Doran v. Central Pac. Co.*, 24 Cal. 245.

12. Railroad, on account of matters of convenience, allowed to refuse coal carriage to all except colliery owners: *Oxlade v. N. E. Ry. Co.*, 15 C. B. N. S. 680.

13. Liability of, on account of blasting done by its contractors: *Stone v. Cheshire R. R.*, 51 Am. Dec. —, and notes.

14. Contract with coal merchants construed as giving undue preference under an act prohibiting such contracts: *Ransome v. Eastern Counties Ry.*, 1 C. B. N. S. 437; 4 Id. 135.

15. That a colliery has a side track to a railroad, or that it has threatened to construct an independent line, is no excuse for giving it preferred rates: *Harris v. Cockermouth Ry.*, 3 C. B. N. S. 693.

16. Interference with the use of a tramway (an easement) is not an eviction: *Williams v. Hayward*, 1 El. & El. 1040.

HILL V. TAYLOR ET AL.

(22 California, 191. Supreme Court, 1863.)

¹**Receiver during period of redemption.** The complaint stated that at a foreclosure sale plaintiff purchased an undivided one third interest in a tract of mining ground; that the mortgagor was in possession and insolvent, and in connection with the owners of the other interests was working the claim and taking the proceeds; that before the expiration of the period of redemption the claim would be worked out and its value destroyed; and prayed judgment for the amount already received by the debtor since the sale, and that during the period of redemption a receiver be appointed to take charge of the proceeds: *Held*, that on the facts stated plaintiff was entitled to the relief sought, and that an order sustaining a general demurrer to the complaint was erroneous.

Mining by receiver preferable to restraining as waste. The extraction of gold from mines is something more than the ordinary use of real estate by one in possession, and requires more than the ordinary remedies to protect the rights of a purchaser at judicial sale, during the period for redemption. It constitutes a waste or destruction of the property itself, and might be restrained; but the appointment of a receiver is preferable, as this allows the continuous working of the claims.

Appeal from the Seventeenth Judicial District.

The facts are stated in the opinion.

VANOLIEF & BOWERS, for appellant.

CREED HAYMOND, for respondent.

CROCKER, J., delivered the opinion of the court, COPE, C. J., concurring.

The complainant in this action avers that the defendants are a mining company; that Taylor, one of the defendants, was the owner of one third of the mining claims of the company and mortgaged the same to one Conley, who assigned the mortgage to the plaintiff; that he foreclosed the mortgage, and on the twelfth day of April, 1862, purchased the interest mort-

¹See *Hayes v. New York M. Co.*, 2 Colo. 273; *Ward v. Carp River Co.*, 47 Mich. 65.

gaged at the sale under the decree of foreclosure; that a certificate of sale duly issued to him; that the defendants are working the claims and taking out gold therefrom; that the dividends upon said one third interest have been from seventy-five to one hundred dollars per month, and will amount to about that sum in future; that Taylor is still in possession of said one third part, and receiving the dividends; that he has demanded of Taylor and the defendants the proceeds of said third part, over and above the expenses of working, and the value of the use and occupancy thereof, which they have refused to pay him; that the claims will be worked out and exhausted before the six months allowed by law for redemption will have expired, and will then be of no value, and that Taylor is insolvent and has no property subject to execution. The complaint prays that the defendants be required to pay him the proceeds of the one third interest over and above the expenses of working the same, and that a receiver be appointed to receive the proceeds during the pendency of the suit. To this complaint the defendants demurred, first, because the complaint did not state facts sufficient to constitute a cause of action; second, because of a misjoinder of parties in joining the other members of the company as defendants with Taylor. The court sustained the demurrer, and entered judgment for the defendants, dismissing the complaint, from which the plaintiff appeals to this court.

The only question submitted is, whether the complaint states sufficient facts to entitle the plaintiff to the relief prayed for. We think it does, and the court below, therefore, erred in dismissing it. Sec. 143 of the Practice Act provides, that "a receiver may be appointed by the court in which the action is pending, or by a judge thereof—first, before judgment, provisionally, on the application of either party, when he establishes a *prima facie* right to the property, or to an interest in the property which is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired." The case made by the complaint is clearly within this provision of the Practice Act. It avers that the claim will be worked out and exhausted before the six months allowed for redemption will

have expired, and that it will then be of no value, and that Taylor is insolvent. The demurrer admits these facts to be true, and if true, it shows that the property purchased by plaintiff at the sale, as well as its rents and profits, are in danger of being entirely lost to him unless a receiver be appointed. The plaintiff is entitled, under law, to the property purchased by him at the foreclosure sale, and to its rents and profits, or the value of the use and occupation thereof from the time of the sale up to the date of any redemption made. In this case, Taylor, the judgment defendant and mortgagor, is receiving all the profits from the property, and as he is insolvent, they will be entirely lost to the plaintiff unless a receiver is appointed. The working of the mines, and the extraction of the gold therefrom, is something more than the common, ordinary use of real estate by one in possession, and requires the use of more than the ordinary remedies to protect the rights of the purchaser. It constitutes a waste or destruction of the very property itself, or all that is of any essential value; and as such might perhaps be restrained, under the provisions of Sec. 235 of the Practice Act. But it is for the interest of all parties that a receiver be appointed rather than stop the working of the claims entirely. The averments in this complaint bring the case within the principles laid down by this court in the case of *Harris v. Reynolds*, 13 Cal. 514.

Judgment reversed and cause remanded.

THE CHICAGO AND ALLEGHENY OIL AND MINING
CO. ET AL. V. THE U. S. PETROLEUM CO.

(57 Pennsylvania State, 83. 6 Phila., 521. Supreme Court, 1868.)

Agreement for, construed as a lease. An agreement to lease land for a term of years, with the exclusive right to bore for and collect oil, giving one fourth to the lessor: *Held*, to pass a corporeal interest.

The taking by lessee of his share of the oil found is not waste, but a rightful act, unless the lease be forfeited by its own terms.

Sudden flow of oil in unexpected quantity considered in connection with alleged breaches of the covenants of the instrument under which the strike was made.

No receiver in a doubtful case. The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion. The court must be convinced that it is needful and the appropriate means to a proper end. It is a strong measure and can not be exercised doubtfully.

No receiver to oust lessee. Where a party has title and possession under a lease in writing, enjoying rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right or a *prima facie* right, with such circumstances of danger or probable loss as will move the conscience of a chancellor to interfere.

No receiver to aid forfeiture. The court declines to appoint a receiver to hold leased property pending the landlord's efforts to enforce an unconscionable and doubtful forfeiture.

Appeal from the decree of the court of *Nisi Prius*. In equity.

This proceeding was a bill in equity, filed April 25, 1866, by the Chicago and Allegheny Oil and Mining Company, the Garden City Petroleum and Mining Company, H. H. Honore and Samuel J. Walker, against the United States Petroleum Company.

The proceeding was founded on the following instrument:

"Articles of agreement made, etc., the 16th day of March, A. D. 1864, between Thomas Holmden, etc., of the first part, and James Faulkner, Jr., etc., of the second part: Witnesseth, that for and in consideration of the covenants, agreements and reservations hereinafter mentioned, and of the sum of \$1, etc., the party of the first part hereby covenants and agrees to lease to the party of the second part, his heirs and assigns, all his right, title, interest and claim in and to all that certain piece or parcel of land lying and being in Cornplanter township, Venango county, and State of Pennsylvania, known and described as follows, to wit: Commencing, etc., * * * containing 150 acres, be the same more or less.

"The said party of the second part to have the sole and exclusive right to bore or dig for oil on said lands, and gather and collect the same therefrom, for the term of twenty years from the date hereof, upon the following terms and conditions, to wit: To give to said Thomas Holmden, his heirs and assigns, one fourth, or twenty-five gallons, out of every one hundred gallons of all the oil that may be obtained from said lands; said oil to be delivered in barrels (the party of the first part to

furnish barrels for his proportion of the oil) at the warehouses of the party of the first part, wherever, on the said tract of land, the said warehouses may be located; said delivery of oil to take place as often as once in twenty days, and the time of such delivery to be fixed by the party of the first part; and the said party of the second part also to haul, free of expense, the empty barrels required from said warehouses to the wells, and said oil to be delivered free and clear of water.

"The party of the second part further covenants and agrees to sell no oil until it is divided as aforesaid, nor to barrel nor divide any without notice to the party of the first part, or his agents, heirs or assigns; and at all times to permit the party of the first part, or his agent, to enter the premises for the purpose of inspecting the operations, of examining the books and of ascertaining how much oil is being obtained, to pay all taxes that may be assessed on said lands during the continuance of this lease, to commence within one hundred and twenty days from the date hereof to dig or bore for oil on said lands, and to continue with due diligence to prosecute the business to success or abandonment; and does moreover agree that if the said party of the second part shall cease to operate for oil, then this lease, and the rights hereby granted, shall be null and void, and the party of the first part shall resume possession of the premises.

"It is further agreed that if the said party of the second part fail to get oil and abandon the premises, he may be at liberty to remove any machinery he may have placed thereon. It is expressly agreed between the parties to this instrument, that the party of the second part shall confine his operations or searches for oil to the bottom lands of said tract, and shall not enter upon and occupy the uplands without the consent of the party of the first part, said party of the first part reserving the uplands for agricultural purposes; also reserving the privilege of erecting buildings on said uplands and the privilege of selling lots on said uplands, subject to the conditions of this lease.

"The party of the first part further covenants and agrees that the party of the second part shall have the sole and exclusive right to mine for coal, iron-ore and all other minerals, which may be obtained on said lands, upon terms and conditions which may hereafter be agreed upon.

"It is moreover expressly agreed by and between the parties to this instrument, that a failure of the said party of the second part to comply with any one of the reservations, conditions or agreements contained in the within instrument, which by its terms are to be done, observed, kept and performed by the said party of the second part, shall work a forfeiture of the rights hereby granted, and the party of the first part, his heirs and assigns, may re-enter upon said lands and dispose of the same as effectually as if this lease had not been made, unless such failure occurred through some unavoidable necessity."

The bill set out the agreement that all Holmden's interest in the land and in the rights reserved under the agreement had been vested in the plaintiffs by several conveyances, the last being dated January 1, 1866, and that the rights of Faulkner under the agreement had vested in the defendants. The bill averred that the defendants have bored for oil on the land, and by themselves, or their sublessees, sunk not less than 100 wells, from which the defendants, since the 4th of September, 1865, had obtained not less than from 340,000 to 350,000 barrels of oil. The bill averred that by the vesting of the fee simple of the lands, together with Holmden's rights in them, the defendants, under the agreement, were bound to deliver to the plaintiffs, in barrels to be furnished by the plaintiffs, the one fourth of the oil once in twenty days, and not to sell any oil until divided, the oil delivered to be clear and free from water; and failure by the defendants to comply with any of the conditions, etc., worked a forfeiture, "unless such failure occurred through some unavoidable necessity." The bill charged that the defendants had not delivered the plaintiff's oil at least once in twenty days, and the oil had not been delivered clear and free from water; that they had sold large quantities before making a division, without sending any, or if any, a false account to the plaintiffs; that they had sold not less than 5,000 barrels, for which they had rendered no account, and refused to render an account; that they had permitted their sublessees to sell and use large quantities of oil without accounting to the plaintiffs for it; that they had furnished fraudulent accounts to the United States revenue officers, thus subjecting all the oil to danger of confiscation; that the defendants had rendered fraudulent accounts, and refused to attend for division of the oil, although duly noti-

fied, and that the failures did not occur through unavoidable necessity, and in other respects had not kept their covenants; that the plaintiffs had notified the defendants that in consequence of the said failures they had revoked the rights of the defendants, etc., and claimed possession, which had been refused.

The prayer was for a decree of forfeiture; for a receiver of the oil to which the defendants claimed to be entitled; an injunction restraining the defendant from exercising their rights under the agreement, and for general relief.

The defendants filed an answer September 14, 1866, averring that they had permitted the plaintiffs at all times to inspect the operations, examine the books, and ascertain the amount of oil; that they had been at all times ready to give the plaintiffs one fourth of the oil, and had delivered a large quantity in accordance with the stipulations of the agreement; that if the whole quantity due plaintiffs had not been delivered it had been because plaintiffs had refused to deliver barrels, as they should have done. The answer denied that they had sold or barreled any oil until after division or notice to the plaintiffs; it admitted that sales without a division had been made, but it was through unavoidable necessity, caused by the plaintiffs' neglect to perform the conditions binding on them; it denied that defendants had not complied with their covenants, as set out in the bill; it averred that the oil delivered was free from water in the sense in which the term is used at oil wells, and that they had equitably performed and were willing to perform all their covenants, etc.

On the 2d of November, 1866, the plaintiffs filed an amended bill, setting out, as in the original bill, and further averring that they had commenced an action of ejectment in Venango county to recover the premises mentioned in the agreement, by reason of the forfeiture heretofore set forth, and brought this bill in aid of that suit; they prayed that an account might be taken of all the oil taken since the plaintiffs' rights had accrued, and for a receiver for the oil to which the defendants claimed they were entitled; for an injunction to restrain the defendants from taking oil, etc., and for general relief.

By agreement of November 27, 1866, the plaintiffs had leave to withdraw so much of the bill as prayed for an account,

and the defendants had leave to file a supplemental answer before December 8, 1866.

The supplemental answer was filed December 6, 1866. It averred: that the defendants had permitted the plaintiffs (called "the land interest") always to enter the premises to inspect the operations; examine the books, etc., and for that purpose allowed them to erect and occupy, rent free, an office opposite the defendants'; that they had been always, and were now, ready to give the plaintiffs one fourth of the oil at the times and places stipulated; that they were not notified until April 9, 1866, that the plaintiffs were owners of the land interest, but had supposed that it had continued in some of their predecessors in title, who had always expressed themselves satisfied with the acts of the defendants in the matters complained of; that before the plaintiffs acquired their interest, a regular system had been established with "the land interest" for their mutual benefit, which practically, but not in principle, somewhat modified the mode of paying the royalty, viz., tri-monthly examinations were made of the amount from each well and that in tanks, which was then divided into fourths, for the land interest, the working interest and the lessees. The oil was seldom removed by the owners, but by purchasers on orders from the owners, and it was removed irregularly at different times, in different amounts and on account of different interests. The accounts were kept separately for each well and each interest: periodical accounts were rendered to plaintiffs which were received and acted on by them. That by an account prepared by defendants it appeared that the plaintiffs had received several thousand barrels of oil more than they were entitled to. The answer also stated circumstances incident to the business of obtaining oil, in view of which the agreement should be construed, and the conduct of plaintiffs in failing to perform their stipulations for promptly receiving and removing their oil, as subjecting the defendants to risk and loss, and averred that they, the defendants, never claimed to deliver oil at any particular place or from any particular tank, but were always ready to fill and had filled all the plaintiffs' orders, the holders of which never complained of the place of delivery. The answer averred that if oil had been sold prior to division it was with the plaintiffs' assent and from unavoidable necessity, which compelled them to dispose of the

oil or stop the works and permit the tanks to overflow; the other denials and averments were the same as in the answer to the original bill.

A cross-bill (in which the defendants in these bills were plaintiffs) was filed November 24, 1866, against these plaintiffs, averring acts which it alleged amounted to an eviction, and prayed the court to decree that said eviction was a sufficient bar to the proceedings in equity and to the action of ejectment, and for an injunction restraining them from proceeding in either, and from collecting any royalty under the lease, for repayment of all royalty paid since the eviction, for an account and for general relief. The defendants in the cross-bill (plaintiffs in the other bills) denied its allegations, and prayed for the dismissal of the bill.

The cross-bill and answer are not referred to in the opinion of the Supreme Court, and are therefore not further noticed.

A large amount of testimony was taken by various examiners, and on the 8th of June, 1867, the case was referred to David W. Sellers, Esq., master, "to find the facts, the law and a decree."

The master found that the habitual mode of division and delivery of the oil had been, that defendants informed the plaintiffs of the amount of oil on hand; that the plaintiffs gave orders for the amount due them, which were accepted by the defendants. The master held that it was immaterial if barrels occasionally were not filled according to the letter of the agreement. He found that the "land interest" never established a warehouse in which to receive their one fourth in barrels; had never received the rent as a whole, but that each owner received his share. The master found that there was an habitual division and delivery as above stated; that there was no willful breach by the defendants of their covenants, and that a refusal to deliver in *barrels* would not work a forfeiture. The master found what books the defendants kept; that they were kept with honesty and accuracy; that such books as were properly subject to the inspection of the "land interest" were not withheld, and that there was no breach of the covenant in relation to inspection of the books.

The master reported that as the prayer for an account had been withdrawn it was not necessary to determine whether there had been a full delivery of the plaintiffs' share of the

oil; but found that a failure to deliver one fiftieth of the amount due (about which amount there was evidence the deliveries to the plaintiffs were short), would not work a forfeiture.

The master reported other findings, whose statement is not necessary to an understanding of the case and its decision.

He finally found that there had been no willful breach of any of the covenants which incurred forfeiture, and reported that the prayer for a receiver and injunction be denied, and that the costs be divided.

Both parties filed exceptions, which were dismissed by the court and the master's report confirmed.

The plaintiffs appealed, and assigned the confirmation of the report for error.

S. G. THOMPSON and MEREDITH, for appellants.

W. H. RAWLE and T. FALLON, for appellees.

The opinion of the court was delivered by AGNEW, J.

The original bill in this case prayed for a decree of forfeiture of the lease held by the defendants, and for the appointment of a receiver for the lessee's share of the oil. The amended bill avers breaches of the covenant in the lease and a forfeiture thereby, states that an action at law has been brought to enforce the forfeiture, and that this bill is in aid thereof, and then prays for an account of all the oil, and for the appointment of a receiver as before, and in the mean time that the defendants shall be restrained from taking and disposing of any oil obtained upon the land. The prayer for an account being withdrawn, the relief prayed for is the appointment of a receiver of the defendants' portion of the oil, and an injunction to restrain the defendants in the mean time, that is, until the suit at law is determined.

The agreement of 16th March, 1864, is manifestly a lease for years of the corporeal tenement, with an added exclusive right to bore for, obtain and take the oil found, returning as rent one fourth of the product to the lessor. To obtain and take the lessee's share of the oil is not waste, but a rightful act under the lease, unless it be forfeited by its own terms. The defendants are in the peaceable possession of their own term,

and have at a vast expenditure of money and labor of themselves and their sublessees fitted up the premises and procured the oil, and have regularly delivered to the plaintiffs their share in payment of the rent, except certain limited quantities, small in comparison with the entire product, which are fairly the subjects of doubt and controversy, and have been for the most part found by the master in favor of the defendants. It is also noticeable that when this lease was made it was unknown to what extent oil would be obtained, and clearly without any anticipation of the immense flow which afterward occurred. More than one hundred wells have been bored, one of which yielded the enormous quantity of seventeen hundred barrels in a single day, while the aggregate quantity is stated in the bill at three hundred and forty thousand barrels. If we reflect upon the utter impossibility of procuring the barrels, filling and hauling them away, the immense amount and extraordinary flow of this most subtle and inflammable product, wholly unanticipated at the time of the contract, we discover at once that the parties themselves were compelled to abandon the literal terms of the lease, and to resort to expedients and substitutes in lieu thereof. Thus we can not avoid perceiving that the alleged breaches are of exceedingly doubtful character, depending upon an attentive consideration of the facts to be inquired into in the suit at law. The master, upon a careful examination of the evidence, having resolved these matters of doubt favorably to the defendants, we can not say there is any well-grounded presumption that a forfeiture has occurred. Possibly it may have taken place, but under the circumstances we are by no means convinced of the forfeiture. Without it there can be no waste, and the tenant's appropriation of his own share is rightful.

What, then, are we called upon to do? Simply to appoint a receiver to take into custody and to deprive the lessee of his share of the product until the plaintiffs can see whether they will be successful in obtaining a judgment of forfeiture in a doubtful case. No receiver is asked for the landlord's portion, and plainly because as to it the purpose is to require delivery without interruption. The actual purpose is to take into custody that which will be mesne profits in the event of establishing the forfeiture. Look at the case in any direction, and all that is in it is to obtain our assistance in giving effect to an

alleged forfeiture, and to restrain the defendants from the exercise of their legal rights under the lease, while the plaintiffs are engaged in experimenting at law for the forfeitures. It is not for the protection of a clear and well-defined right, and to prevent an irremediable injury which may ensue if we do not intervene, nor is it the ordinary case of one who shows an equitable right in the subject of custody, and asks the court to interfere for its security until the termination of litigation.

The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion. The court must be convinced that it is needful and is the appropriate means of securing a proper end. Such an appointment is a strong measure, and not to be exercised doubtfully. Where a party is clothed with title and possession such as are conferred by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right in such a case, or a *prima facie*, with such attending circumstances of danger or probable loss as will move the conscience of a chancellor to interfere.

Finding no such elements in this case the bill is dismissed, and the costs ordered to be paid by the plaintiffs.

CARTER V. HOKE ET AL.

(64 North Carolina, 348. Supreme Court, 1870.)

Pretended sale for cash—Sight draft. Where a bill to rescind a sale of land averred that the intended consideration was *cash*, to which end a sight draft had been given that had not been paid, and whose drawers were insolvent, and this was not denied, it was held that there was equity in the bill and that it stood confessed.

Plea in equity defined. A plea in equity is a special answer, only allowed when it puts the matter upon some *one point* which is decisive of the controversy.

Innocent purchaser without notice. The defense, that a defendant is an innocent purchaser for valuable consideration without notice, may be set up either by plea or by answer. The distinction stated between answer and plea in such case.

Idem—Burden of proof. Upon such defense, after defendant proves the consideration paid, the plaintiff must show, if he can, that there was notice.

A receiver of a mine ought not to be appointed in a case which would involve a stoppage of the work, where neither insolvency nor mismanagement are charged against the defendants.

Motion to vacate an injunction, etc., before HENRY, J., at Spring term, 1869, of Madison Court.

The action had been brought in August, 1868, in order to rescind a conveyance made in May, 1867, by the plaintiff, to the defendants, Robert F. Hoke, Thomas J. Sumner, E. Nye Hutchinson, George W. Swepson and Robert R. Swepson, of a valuable iron mine in Mitchell county, known as the Cranberry iron ore bed; to have the defendants Chas. W. and Francis B. Russell, who had bought from Hoke and his associates, and also Samuel W. Williams and J. C. Hardin, who otherwise and previously had connection with the title, declared to be trustees of said property for the plaintiff; and in the mean time, to have a receiver appointed, etc.

The pleadings were very elaborate, especially the answer of Hoke, Sumner and Hutchinson, which covered ninety-eight pages of foolscap.

All that seems necessary to state here is, that the plaintiff charged that the defendants first named above had contrived a scheme to defraud him of the property in dispute, of which he owned much the larger interest, and that after deluding him with many negotiations upon the subject, at last they agreed to pay him \$44,000, *cash*, for his interest; that upon his tendering the deed, they, after making divers excuses, offered him a *sight draft* upon a bank in New York, which they represented to be upon funds deposited by them there, and that he, with some reluctance, received it; that upon presentation it was protested, and has never been paid; that the drawers are insolvent, and have since sold the land to the defendants, the Russells, etc.

The defendants Hoke, Sumner and Hutchinson, by joint answer, gave a detailed account of their connection with the transaction, and alleged that it was owing to certain ill faith and misconduct of the plaintiff, which they set forth, that the draft was not paid; that although given *at sight*, it was abundantly understood by the parties that the funds to meet it were to be obtained within a few days of the time when it was given, by a resale then pending, which sale was afterward

defeated by the plaintiff; that subsequently they had sold to the Russells, etc.

The Russells, "answering," stated briefly, that they were purchasers without notice, at the price of \$50,000, which they had paid at the time of taking the deed, March 30, 1868.

It seems unnecessary to refer to the other answers.

Upon the coming in of the answers, a motion was made to vacate the order for a receiver, and also the injunction.

His Honor allowed the motion, and the plaintiff appealed.

GRAHAM, for the appellants.

PHILLIPS & MERRIMON, *contra*.

PEARSON, C. J., in respect to the defendants Hoke, Sumner and Hutchinson.

The answers are full and responsive to the allegations of the bill (although not to be drawn into precedent, because prolix and argumentative) and the injunction can only be sustained by "equity confessed."

These defendants admit that the sale by Carter to them was *a cash sale*; that Carter accepted the "sight draft" as *money*, and delivered the deed, upon their assurance that the draft would be paid on presentation; and that the money was not paid. Here is "an equity confessed," unless it can be avoided on the hearing, to wit: Carter, trusting to their assurance that the money would be paid on the presentation of a sight draft, instead of retaining the title as a security for the payment of the purchase money, *takes their bond* for it and executes the deed. When their bond was not made good, as little as in conscience they could have done, nothing else appearing, was to tender him back the deed and take a bond for title when the purchase money was paid, or else to give him a mortgage on the land to secure the purchase money. There is a further "equity confessed," to wit: the defendants, without paying for the land, or securing payment of the purchase money in any way, actually transfer the land to the defendants, the two Russells, make no provision whatever for the payment of the purchase money, and do not pretend that they are able, or have any intention to pay it. On the

contrary they confess they are not able to pay the purchase money and do not intend to do it, if they can avoid doing so.

We think there is equity confessed, and refrain from entering further into the subject lest it might prejudice the grounds set up in the answer by way of avoidance.

2. As to the defendants, the two Russells, they file what is called an answer, but what is in fact a *plea*, in which, without responding to any of the allegations of the bill, they rely on the grounds that they are "purchasers for valuable consideration and without notice."

A plea in equity is a special answer to avoid a general answer, under the rule that if one answers at all he must answer fully; and the plea is only allowed when it puts the matter upon some *one point* which is decisive of the controversy, as a "release," or a *purchase for valuable consideration without notice*: Mitford's Plead., 276.

Passing over the alleged irregularity in regard to the authentication of this answer, it does not profess to respond to the allegations of the bill, and the parties put themselves on the ground of being "purchasers for valuable consideration without notice," and of course not subject to the plaintiff's equity.

In this stage of the proceeding how is the court to know that they have paid a valuable consideration? Admitting the proof of this fact will put on the plaintiff the proving of notice; still here is a new matter relied on by way of avoiding the plaintiff's equity, and until the plea is disposed of, these defendants are not in a position to sustain a motion to dissolve the injunction.

A plaintiff may not know whether a party to whom the property is transferred has paid a valuable consideration or not, or whether he bought with or without notice. Hence it is not necessary in the *stating part of the bill* to set out either that the property had been transferred without a valuable consideration, or that he had notice. It is sufficient to state that one who held the legal title subject to the plaintiff's equity has transferred it to another party to evade this equity, as is done by this bill. The party may then, either by plea or answer, set up the defense that he is a purchaser for valuable consideration and without notice, but if he answers he must do so

fully and go into particulars, in order to entitle him to ask for a dissolution of the injunction.

The rule that where a defendant relies on the defense of "purchaser for valuable consideration without notice," on proof that he paid a valuable consideration, the burden of disproving the negative part of the defense is put on the plaintiff, has an analogy in proceedings at law.

The declaration in an action against an administrator does not allege in so many words that the defendant has assets, still, upon the negative plea, "no assets," the burden of proving assets is on the plaintiff, because in the declaration there is, by implication, an allegation of assets; for otherwise the defendant does not unjustly *detain* and refuse to pay the debt of his intestate.

The plaintiff may, if so advised, set out in the *charging part of the bill* his information as to particular facts tending to show that no consideration was in fact paid, or that the party had actual or constructive notice. This will impose on the party the necessity of filing an answer in support of the plea, for which reason it is called "an anomalous plea." This, however, is done only for the purpose of attaining a discovery on oath, and is by no means necessary in stating the plaintiff's ground of equity. If particular instances of notice or circumstances of fraud are *charged*, they must be denied as specially and particularly as charged in the bill. This special particular denial of notice or fraud must be by way of answer in support of the plea. Mitford, 276.

In our case the bill does not charge, *by way of anticipating the defense*, that the defendants had notice; so what is called an answer is in the most approved form of a plea, "purchaser for valuable consideration without notice," except that it does not aver *positively* that the *vendors* were in possession at the date of the execution of the deed; and an answer was not required to support this as a *plea*. But looking on it as an answer, it is not responsive, and is not so full and satisfactory as it should be, if intended as the foundation of a motion to dissolve the injunction.

It is not probable that these defendants paid \$50,000 cash without inquiring as to the title, and as to all of its "environments." This required no explanation in a plea, but in an answer the party professes to set out all that he knows, or be-

lies from information, relevant to the subject of controversy, and the court can not fail to notice that in the answers of their co-defendants, Hoke, Sumner and Hutchinson, it is averred that these two defendants, *at the first*, advanced \$30,000 for an interest in one fourth of the property, to be expended in its development, and afterward, at how long an interval is not stated, paid \$50,000 cash for the fee simple estate in the whole; so these gentlemen had greater means of information than is disclosed by their answer.

Is a court expected to be able to believe that in this interval these gentlemen had not heard of the loud clamor of the plaintiff that he had parted with a legal title on a *cash sale*, at the price of \$44,000, and had never received one cent of the purchase money?

These objections to the answer, and the consideration that the allegation of being purchasers for valuable consideration without notice is matter of avoidance, in our opinion fully meet the motion to dissolve the injunction.

But we are of opinion that the order for a receiver, by which, of course, the mining operations must be stopped (for the receiver had no funds to meet the necessary outlays), was improvidently granted; for there is no allegation that the defendants Charles W. Russell and Francis B. Russell are insolvent, or not amply able to account for the mesne profits, in the event that the land is held liable for the plaintiff's claim, or that the property is being injured by their management; on the contrary, it is better for all sides to keep the works in operation.

3. In respect to the defendants Harden, Williams and the two Swepsons, it appears by the answer that they are not affected by the injunction. But they are necessary parties, because their rights may be involved in the final adjustment of the whole matter. So they must be content to abide the course of the suit, and have no right to interfere upon the question of injunction and the appointment of a receiver.

4. There is error in the decretal order.

It will be modified so as to continue the injunction against any disposition or transfer of the land until the final hearing, leaving the order to stand so far as it discharges the receiver, and allows the defendants Chas. W. and Francis B. Russell to resume the operation of the works.

The costs in this court will be paid by the defendants Hoke, Sumner and Hutchinson.

This will be certified.

PER CURIAM.

Ordered accordingly.

CURTIN & TUMLIN V. MUNFORD & GILBREATH.

(53 Georgia, 168. Supreme Court, 1874.)

Personal liability continuing after appointment of receiver. Where plaintiffs agreed to furnish ore daily to a furnace during a certain period, and while furnishing such ore a receiver was appointed for the firm owning the furnace, at the instance and for the benefit of one of the members of the furnace company, it was *held*: that the original contracting parties continued liable for the ore furnished to the receiver.

When evidence is not objected to at the trial its admission will not be considered as error.

The Supreme Court can not re-inquire into questions of fact and of credibility already passed upon by a jury.

Before Judge McCUTCHEN. Bartow Superior Court, March term, 1873.

For the facts of the case see the decision.

WOFFORD & MILNER, GEORGE N. LESTER, for plaintiffs in error.

J. A. W. JOHNSON, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendants on an open account for the sum of \$873.85, with a bill of particulars annexed. On the trial of the case the jury found a verdict in favor of the plaintiffs for \$466.28. A motion was made for a new trial on the following grounds: 1st. "Because the verdict is strongly and decidedly against the weight of the evidence." 2d. "Because the court erred in permitting L. S. Munford to testify that he made his entries in his books from slips of paper furnished the drivers who

hailed the iron ore." 3d. "Because the items sued on in plaintiffs' account were created, if at all, by Cox, as receiver, and after the whole business of Curtin & Tumlin had been taken charge of by the court under a bill in equity, and that defendant Tumlin is not liable for said account so made after the business was in the hands of the court."

1. It appears from the evidence in the record that James Curtin and Tumlin were partners in running an iron furnace in Bartow county, under the firm name of Curtin & Tumlin. It also appears from the evidence in the record, that on the 1st day of November, 1870, Curtin & Tumlin made a written contract with the plaintiffs, by which they agreed to furnish the defendants on an average of six tons of iron ore per day for the term of twelve months from the date of the agreement, for which the defendants were to pay the plaintiffs \$3 per ton monthly, or at the end of each month; the plaintiffs' account is for the balance due them for iron ore delivered in pursuance of that agreement. The record shows that an extract from the minutes of Bartow Superior Court was read in evidence, from which it appears that on the 3d day of December, 1870, an order was granted in an equity case, in which Tumlin was complainant, and James Curtin and Austin Curtin were defendants, (the bill not being in the record,) appointing a receiver to take charge of and manage the property of said partnership, and manage it so as to make the most he can out of the same and pay the debts due by the partnership, paying first those debts due to others than the parties to this bill; that the receiver make no new debts to bind the partnership in any way, and that he keep an account of his receipts, expenses, disbursements, payment of debts, etc., and make return of his actings and doings at the next term of the court. The record shows that another extract from the minutes of the court was offered in evidence, from which it appears that a second order was made in the equity case between the same parties on the 17th day of December, 1870, in which it is recited that the receiver appointed by the first order had failed to give bond and security as required therein, and that John Cox had been suggested by the complainant, Tumlin, as a proper person for receiver. It was ordered by the court that said Cox be appointed receiver of the partnership effects of Curtin & Tumlin upon the same terms and conditions as expressed in the former order. The

evidence in the record that the iron ore was delivered by the plaintiffs to the furnace of the defendants in pursuance of the agreement made on the 1st of November, 1870, is quite clear; that agreement was made before any receiver was appointed, and the question is, whether the partners are bound to pay for it. There is no evidence in the record of a dissolution of the partnership of Curtin & Tumlin, by the decree of the court or otherwise, except that Curtin has left the country. Cox, it appears, was appointed receiver at the instance of Tumlin, and according to his evidence and Munford's, the furnace was run afterward, when the plaintiffs' ore was received and used for the benefit of Tumlin. It is true that Tumlin denies it, and he is corroborated by Lyon, but the evidence in relation to that point in the case is conflicting. If the iron ore was delivered by the plaintiffs under the agreement made with Curtin & Tumlin before the receiver was appointed, and was used for the benefit of Tumlin after the receiver was appointed, then he ought to pay for it, and that was the question for the jury to decide under the evidence before them. Whether the receiver, after his appointment, received and used the iron ore delivered by the plaintiffs under the agreement of the 1st of November, 1870, under the order and direction of the court, or whether he received and used it under the direction and for the benefit of Tumlin, was a question of fact under the evidence in the record. There is no complaint as to the charge of the court to the jury, and the presumption therefore is, that the court charged the law applicable to the facts of the case correctly.

2. If the evidence of Munford as to the manner in which the entries were made on his books was objectionable, which is not at all apparent to us from his testimony, still it does not appear in the record, or in the motion for a new trial, that the admission of the evidence was objected to at the time of the trial.

3. Assuming that the jury, under the evidence, believed that the furnace was run by Cox for the benefit of Tumlin, and that the plaintiffs' ore was received and used for his benefit, then the verdict is quite moderate as to the amount found by them. The real object of the motion for a new trial was to have the verdict of the jury set aside on the ground that it was against the evidence. The other grounds taken in the

motion are merely *colorable* to get rid of the verdict. The presiding judge, in the exercise of the sound discretion vested in him by law, refused to grant the new trial, and we are called on to control the exercise of that discretion. Upon what principle shall we control it? Shall we control it because he erred in not holding that the jury should have believed the witnesses for the defendants instead of the witnesses for the plaintiffs? What legal power or authority have courts to compel juries to believe the witnesses sworn on one side in preference to those sworn on the other? If the court before which the case was tried, which saw and heard the examination of the witnesses, has no such legal power or authority, much less has this court any such legal power or authority. It was never intended, when this court was organized, that it should be a tribunal to determine questions of fact, or to judge of the credibility of witnesses. One of the prominent objections of the people of this State to the establishment of a Supreme Court for the correction of errors was that it would deprive them of the right of having questions of fact tried by a jury of the vicinage, as they had theretofore been accustomed. The reply was that the Supreme Court was to be established for the correction of errors of *law*, and not to decide questions of *fact*, and such has been the general ruling of this court from its first organization up to the present time. Notwithstanding this general ruling of the court, fully one third of its time is occupied in the argument of cases upon the facts, as if we were a jury to decide upon the facts and judge of the credibility of the testimony of witnesses. If parties and their counsel would observe this general ruling of the court in relation to motions for new trials on the ground that the verdict of the jury is contrary to the evidence and the weight of the evidence, instead of coming here for the purpose of *experimenting* upon this court in the hope of obtaining a new trial, when no rule of law has been violated, it would save a great deal of time and unnecessary trouble. We all know, from observation and experience, that as a general rule no one is ever satisfied when the judgment of a court, or the verdict of a jury, is rendered against him, and this court has no power to compel parties to be *satisfied*; but it has the power to compel parties to *acquiesce* when a lawful verdict and judgment has been rendered against

them, and when that has been done it is for the interest and welfare of the commonwealth that there should be an end to litigation, so far as that particular case is concerned.

Let the judgment of the court below be affirmed.

SIMPKINS, Receiver, v. THE SMITH & PARMELEE
GOLD COMPANY ET AL.

(50 How. Pr. R., 56. Supreme Court of New York, 1875.)

¹ The appointment of a receiver in one State does not operate to pass title to such receiver in property of the corporation situated in another State; and either its creditors or the corporation itself can dispose of such property unaffected by the appointment of such receiver.

Kings County, special term, November, 1875.

The plaintiff in this action is the receiver of the New York Gold Mining Company, a corporation organized under the general laws of this State in 1864, with a capital of \$1,000,000.

The plaintiff was appointed receiver by an order of the Supreme Court, on petition of a judgment creditor of the corporation, under the Revised Statutes.

All the property of the debtor corporation consisted of real estate situated in the Territory of Colorado.

Subsequent to appointment of receiver in this State, several judgments for large amounts were recovered against the debtor corporation in Colorado, and on those judgments executions were issued, and thereupon all the property of the debtor corporation was sold at sheriff's sale in Colorado.

The receiver gave public notice of his appointment at said sheriff's sale.

This action is brought to have it judicially determined that as against the plaintiff no title to said property, in Colorado, of the debtor corporation, was acquired through said sheriff's sale on execution, and to have the defendant, in whose possession the property now is, account to the plaintiff for the same.

The complaint set forth substantially the matters as above

¹ *Hazard v. Durant*, 19 Fed. 472; *Chicago Ry v. Keokuk Co.*, 108 Ill. 317; 48 Am. R. 557.

stated, and the defendants separately demurred to the complaint on the grounds:

1st. That the court had no jurisdiction of the subject of the action.

2d. That the plaintiff had not legal capacity to sue, and for defect of parties, improper joinder, and generally, as not stating facts sufficient to constitute a cause of action.

The demurrers were argued before Mr. Justice Pratt, at special term in Brooklyn, in September last, by John S. Lawrence, counsel for the defendants, and A. H. Dana, counsel for the plaintiff. Judge Pratt has recently rendered the following opinion, sustaining the demurrer of the defendants:

PRATT, J.

It may well be that where the courts of this State have acquired jurisdiction of the person of a defendant, it may compel him to execute a conveyance of lands in another State when the plaintiff shows an equitable right to such conveyance; but that does not entitle plaintiff to the relief claimed in this action.

So far as the property of the New York Gold Mining Co., of Colorado, lay within this estate, the appointment of a receiver would doubtless vest the title in the receiver; but as to real property outside of the jurisdiction, the appointment can have no such effect, either in law or in equity.

A proceeding *in invitum* can have no force outside the jurisdiction where the proceeding is initiated.

It follows that the property of the New York Gold Mining Co., of Colorado, situate in Colorado, did not vest in the receiver; it remained the property of the company, and could be disposed of by it as if no receiver had been appointed.

As to such property, any creditor of the company could have resorted to the Colorado courts, and in a proper action against the company secured such rights and remedies as that jurisdiction afforded him. Failing in any such action by the creditors of the company, the corporation itself could proceed to use or dispose of the property, entirely unaffected by the appointment here of the receiver.

Notice of the appointment in New York of the receiver entirely fails to stamp any character of fraud upon the subse-

quent action of the officers of the company; any action on their part, lawful and proper, in case no receiver has been appointed, was lawful and proper after such appointment has been made.

It may well be that upon the facts stated in the complaint the creditors of the original company may be entitled in the Colorado court to a lien upon the property in the hands of its present holders.

But such action should be brought by the creditors; the receiver has no title to the property in Colorado, and hence can not sustain this action. His rights can be no greater in a New York forum than they could be in Colorado.

It follows that the defendants are entitled to judgment on the demurrer.

GIBBS ET AL. v. DAVID ET AL.

(Law Reports, 20 Eq. 373. Before the Vice Chancellor, 1875.)

¹ **Appointment of receiver of colliery, pending suit to rescind.** In a suit by the purchaser of a coal mine to rescind the contract on the ground of fraud, it being essential that the mine should be kept in a going state, the court, upon the application of the purchaser, who was in possession of the colliery, appointed a receiver and manager until the hearing.

This suit was instituted for the purpose of obtaining a declaration that a contract dated the 1st of November, 1873, for the purchase of a colliery by the plaintiffs, was obtained by fraud, and was void as against the plaintiffs, and that the said contract and certain promissory notes which had been given in part payment of the purchase money might be ordered to be delivered up to be canceled. That an account might be taken of the sums received by the defendants, and that they might be ordered to repay what should be found due. That the assignment, a memorandum of deposit which had been given to secure part of the purchase money and all other instruments and documents consequential on the contract for purchase, might be dealt with so as to restore the parties as nearly as

¹ *Crawshaw v. Maule*, 11 M. R. 223.

possible to their original position. That an injunction might be granted to restrain the defendants from parting with or negotiating any of the promissory notes given by the plaintiffs, which were in their hands, and that a receiver and manager might be appointed to carry on the colliery for the benefit of such persons as might be decided to be the owners thereof, in such manner as the court should direct.

The bill alleged that the plaintiffs had entered into negotiations with the defendant T. S. Webb, who proposed to them to join him (Webb) in the purchase of a coal mine called the Hendredenny Colliery, which had been leased to the defendants David and Sloper, the plaintiffs finding the purchase money in the first instance. For this colliery the plaintiffs were to pay £30,000; £5,000 in cash and the rest in installments, extending over four years, to be secured by the promissory notes or bills of the purchasers. The agreement for the purchase was executed and several of the installments were paid, when the plaintiffs discovered that Webb had been acting as the agent of David and Sloper for the sale of the mine, and that the defendant Thomas Davies was associated with them, that they were all to receive certain portions of the profits arising from the transaction; that Webb had received from David and Sloper a large sum as commission for effecting the sale, and that the mine, which was represented to be of great value was, in fact, worth much less than the price paid, and at the time of filing the bill had not begun to pay working expenses.

The bill also alleged that it was essential that the mine should to some extent be worked, in order to avoid flooding and other injury, and also to prevent forfeiture to the landlord, and that it would be for the benefit of all parties interested that the receiver and manager should be appointed in the suit, so that the property might be preserved until the hearing, without prejudice to the question whether the plaintiffs were entitled to rescind the purchase, or whether the colliery was to belong to the plaintiffs.

The plaintiffs had entered into possession of the mine.

An interim injunction had been granted to restrain the negotiation of the bills in the hands of the defendants.

MR. GLASSE, Q. C., MR. HIGGINS, Q. C., and MR. HEMMING, for the plaintiffs, now moved that a receiver and manager had been appointed to carry on the colliery until the hearing.

MR. COTTON, Q. C., and MR. MACNAGHTEN, for the defendants David and Sloper.

The defendant Webb was not represented.

Sir R. MALINS, V. C.

As far as I know of the case at present, although the precise circumstances certainly have not occurred before, I can not help thinking that, upon principle, I shall not much err if I accede to the application of the plaintiffs.

The question brought before the court is a very remarkable one. The two plaintiffs, Mr. Gibbs and Mr. Joachim, are, it is stated, merchants in the city of London, and their case is this: that by representations made to them by the defendant Webb they have been induced to purchase a colliery in South Wales. They allege that the representations made by Webb were entirely false, and that if they had known the falsehood of such representations they would not have purchased the colliery. The persons from whom the colliery was bought are Mr. Cotton's clients, Charles William David and John Sloper, and of course, if it turns out that whatever representations were made by Webb were made without the knowledge of these two defendants, they will not be answerable, and the suit will fail. But the bill alleges that in point of fact Webb was the bribed agent of these two defendants to make these false representations, and if this turns out to be the truth and is established by the hearing, the contract will be set aside, the suit will succeed, the plaintiffs will be entitled to be relieved from all further payments, and will take out of the court all the moneys paid in and all that may be hereafter brought in. In other words, the contract will be undone. But the property is a colliery, and a going colliery, and both sides admit that it must be kept going, or the lease will be forfeited; and moreover, if it is not kept going it will be drowned out; and therefore it is absolutely necessary it should be worked.

In this state of things I think it is clearly uncertain to whom the colliery belongs. If the plaintiffs are right in their allegations on the bill, the colliery does not belong to them, but to David and Sloper. If, on the other hand, the allegations are erroneous, then the colliery belongs to the plaintiffs, and David and Sloper have nothing to do with it.

It is according to the practice of the court to keep property in security until the right is decided; and therefore, it being totally uncertain to which of these two parties the colliery belongs, it does seem to me in accordance with practice and principle that the property shall as far as possible be kept in security.

Then it is asked, why should this be done? The plaintiffs are in possession; they say they were fraudulently induced to take possession, and being in possession they are incompetent to deal with the property in its present position, and if they should succeed in this suit they will have a demand against the defendants for all moneys properly expended in working the colliery. It is of very great importance that the colliery should be so worked as to leave as little doubt as possible whether it was properly or improperly worked. If the court appoints an officer competent to manage a colliery, and he says, I have carried on the colliery and made a gain, then the gain will belong to the party to whom the mine belongs. If on the other hand he says, I have been obliged to carry on the colliery at a loss, that loss will have to be borne by the plaintiffs if they fail in their suit, and by the defendants if the plaintiffs succeed.

Now I will assume in favor of the defendants that all these charges are unfounded and that the suit will fail, and I will continue to act upon that assumption until the contrary is proved; if, therefore, the suit does fail and a receiver is appointed, and he is supplied with the means of carrying on the colliery by the plaintiffs, what damage will be done to the defendants? It is impossible they can be damaged to the extent of a farthing. If, on the other hand, the suit should succeed, then a very material benefit may arise to the plaintiffs in the manner I have pointed out, on its being ascertained in this way what is the proper expenditure in carrying on the colliery; therefore I shall do what this court is constantly in

the habit of doing and as has been done in *Boehm v. Wood*, 2 Jac. & W. 236. There it was uncertain to which of two parties the estate belonged, because, although the plaintiff was the vendor, he had sold it to Wood. Wood took objections to the title, and if those objections were well founded, the estate belonged to the vendor, and if they were unfounded they belonged to Wood. A receiver was appointed upon the principle that it was uncertain to which of the two parties, plaintiff or defendant, the estate belonged; it seems to me in this case that the court should appoint a protector or manager of the estate, in order that when it is decided to whom it belongs justice may be done. Therefore upon principle, and I think upon authority, I shall accede to the application that a receiver be appointed. The plaintiffs must supply the means of carrying on the colliery, and, as in *Boehm v. Wood*, 2 Jac. & W. 236, the question at whose expense the receiver is to be appointed and the colliery is to be carried on will be reserved. If the suit succeeds it will be at the expense of the defendants. The receiver's duty will be to keep the colliery going, and out of his receipts he will pay all the outgoings, and so far as they are insufficient, the plaintiffs must undertake to supply him with the money required. The plaintiffs will nominate a receiver and the defendants will be heard in chambers; but it will be my duty to see that a man is appointed who is skilled in the management of collieries and who will do the best he can for both parties. The defendants must also undertake not to negotiate the bills in their possession.

PARKER ET AL. V. PARKER ET AL.

(82 North Carolina, 165. Supreme Court, 1880.)

¹ **Receivership preferred to injunction.** In controversies concerning the right to mines, involving separate titles, or between tenants in common, it is the settled doctrine in North Carolina that the working of mines ought not to be stopped, and the method adopted is the appointment of a receiver to secure the mines and profits.

² **Receiver not prayed for.** In a proper case a receiver may be appointed where the application of the plaintiff was for an injunction.

Motion to dissolve an injunction, heard at fall term, 1879, of Stanly Superior Court, before Buxton, J.

It appearing that the real estate in controversy is a mining interest, and the court being of opinion that it is against public policy to obstruct the working of mines and the development of the resources of the State, ordered the injunction theretofore granted to be dissolved and appointed a receiver, to the end that the property in litigation be secured until the rights of the parties are determined in the action.

From this judgment the plaintiff appealed.

Mr. W. J. MONTGOMERY, for plaintiffs.

Cited *Miller v. Washburn*, 3 Ired. Eq., 161; *Troy v. Norment*, 2 Jones' Eq. 318; *James v. Norris*, 4 Jones' Eq. 225; 3 Jones' Eq. 177; 2 Ired. 239.

Mr. J. W. MACNEY, for defendants.

Cited *Falls v. McAfee*, 2 Ired. 236; 4 Ired. Eq. 61; 3 Jones' Eq. 177; 71 N. C. 463 and 329.

DILLARD, J.

The plaintiffs commenced action by summons for the recovery of a tract of land on which was a gold mine, and simultaneously therewith, or soon thereafter, applied for and obtained an injunction upon the claim, as disclosed by their affidavits, that they were sole owners in fee and had had a possession themselves and under their father for sixty years, and

¹ *Hill v. Taylor*, 12 M. R. 568; *Deep River Co. v. Fox*, 1 M. R. 296.

² *Whitney v. Buckman*, 10 M. R. 428.

that defendants had unlawfully and forcibly entered upon said land and were irreparably injuring them by digging for and taking away the gold, to pay for which they were utterly unable by reason of their insolvency.

The defendants subsequently, on their motion to dissolve by affidavit in reply to affidavit of plaintiffs on which the injunction was obtained, denied that plaintiffs were sole owners in fee of the mines, ores and minerals in said land contained, but alleged that the heirs at law of James Parker, John Parker and William Parker were tenants in common with the plaintiffs therein, and as such had the right to make and had made to them a lease for their interest, in virtue of which they had entered on the land and were digging for gold, and they averred that they had not ousted the plaintiffs or any tenant of theirs from the land, nor excluded or claimed to exclude the plaintiffs from digging for gold also. They offered to give account of the gold they had found, and represented themselves able, though of small means, to respond in damages for any recovery that plaintiffs might effect against them.

On consideration of the motion to dissolve the injunction in connection with the affidavits of the parties and others in support on each side, his Honor, finding the real estate in controversy to be a mining interest, ordered the dissolution prayed for. But on the admission by the defendants in their affidavit of a right in the plaintiffs, as tenants in common in the said mining interest with their lessors, and of a doubtful ability on their part to respond for the value of the gold they might find and appropriate to their own use, the court adjudged it a proper case for a receiver, and appointed one. And this action of the judge is the ground of plaintiffs' complaint.

His Honor found the subject of the controversy to be a mineral interest, and the fact found seems to be justified by the affidavits filed. That fact and the others found by him would seem to authorize the judgment, which is claimed by plaintiffs to be erroneous.

In controversies concerning the right of property in land between two persons claiming by separate and distinct titles, the court will not interfere, by way of injunction or the appointment of a receiver, with the free use and enjoyment of the party in possession, unless it appear that the plaintiff will

lose the rents and profits to which he will be entitled in case he establish his title: *Baldwin v. York*, 71 N. C. 463; *Bell v. Chadwick*, Id. 329. Equally adverse is the court to interfere between the tenants in common in dispute over the question of connection in ownership between them. And in such case it is laid down as the rule that no interference will be made as against the party in possession, unless he absolutely exclude the other from all enjoyment; or, the property being of such nature as not to admit of user by hostile claimants—as here, a mine—there shall be a reasonable fear that accountability will be unavailing by reason of the insolvency in the perception of the rents and profits: High on Receivers, § 603, *et seq.*

Applying the principles to the case under consideration, it would seem that in accordance therewith the jurisdiction of courts might be invoked, and in the case of co-tenancies generally, the power would exist and might be exercised in the discretion of the judge either in granting an injunction or in the appointment of a receiver. But the case of mines is in our State an exception to the general rule, and in regard to that kind of property it is the settled doctrine that the working of mines ought not to be stopped, from consideration of public policy and in justice to the private party who might in the end be adjudged to be the owner or part owner, and therefore an order of injunction ought not to be issued in such cases, but rather the method adopted of having the issues and profits secured through a receiver, ready for delivery to the party who should be decided to be owner.

In *Falls v. McAfee*, 2 Ired. 236, the court enunciate the rule as above stated, and then say: "It is indeed surprising that the plaintiff (Falls) had not at the first opportunity moved to discharge the injunction by submitting to an order for a receiver."

And in this language of the court there is express sanction of the course of his Honor in the case here. The principle of the case of *Falls v. McAfee* has been referred to and approved since, and may be taken as the rule with us. See *Deep River M. Cr. v. Fox*, 4 Ired. Eq. 61; *Gause v. Perkins*, 3 Jones' Eq. 177.

On the application for the injunction, therefore, the order

allowing it was improvidently made, and in place thereof a receiver should have been appointed, thus saving plaintiffs against any loss from the continued working of the mine, and just to the defendants in case at the end of the law their lessors were found interested in the property as co-tenants.

By the appointment of a receiver the plaintiffs are effectually secure against loss in the diminution of the value of the mine, and at the same time public policy interested in the development of the resources of the country as well as private justice are all cared for and protected.

We think that which should have been done under the authority of the decisions of our State on the original application for the injunction might be done afterward, on the motion of the defendant for the dissolution of the injunction, which was granted, although a receiver was not asked for by plaintiffs. *Falls v. McAfee, supra*; High on Receivers, §§ 98, 743.

The dissolution of the injunction and the appointment of a receiver by his Honor in the court below was, in our opinion, in accordance with law, and the judgment is therefore affirmed. Let this be certified.

No error.

Affirmed.

ENTERPRISE TRANSIT COMPANY'S APPEAL.

(11 Reporter, 109. Supreme Court of Pennsylvania, 1880.)

Receiver pending ejectment. A court of equity will not appoint a receiver to take charge of oil property pending an action of ejectment therefor.

Appeal from Common Pleas of McKean County.

The appellant filed in the court below a bill, setting out that under an oil lease executed by the defendants, Patrick and Maryette Sheedy, his wife, it had entered upon certain oil land, the property of Mrs. Sheedy, and had begun operations, when it was ejected by the defendants, Roberts and Lockwood,

who claimed title under a subsequent lease from Mrs. and Mr. Sheedy; that ejectment had been brought by the plaintiff against the defendants, but that the defendants would, unless restrained, deplete the oil property before said ejectment could be determined. The bill prayed: 1. An injunction restraining defendants from drilling wells, or producing or removing oil from the premises. 2. The appointment of a receiver. Williams, P. J., on preliminary hearing refused an injunction, but appointed a receiver; but on final hearing, holding the plaintiff's lease void, vacated the appointment. The plaintiff appealed.

HANLIN & SON (with them W. B. CHAPMAN), for appellant. The appointment of a receiver is, from the peculiar *status* of property in oil producing territory, the only remedy to prevent waste pending ejectment: *Kane v. Vanderburgh*, 1 Johns. Ch. 11; *Chicago Oil Company v. U. S. Petroleum Company*, 7 P. F. S. 91; *Mc Vicker v. Ross*, 55 Barb. 248.

PER CURIAM.

It may be that the peculiarity of the property in an oil well is such that an injunction to stay waste, on a writ of *estrepement*, will not be an adequate remedy for an owner out of possession. But that will not authorize a court of equity to assume jurisdiction to try the title upon what is merely an ejectment bill, and thus in effect deprive the parties of their constitutional right of trial by jury. Much less will it justify a court in appointing a receiver who shall summarily enter into possession, turning out the actual possessor and receiving all the profits. Ejectment and a recovery of the mesne profits in that or a subsequent action seem to be the proper, and must be regarded as adequate remedies. We can draw no distinction between a farm and an oil well. It is clear that the court below had no jurisdiction except to enjoin waste, and it is unnecessary to consider the ground upon which the decree below was put by the learned judge. The case therefore is ruled by *Schlecht's App.*, P. F. S. 172; *Tillmes v. Marsh*, 17 Ib. 507; *Christie's App.*, 4 Norris, 463, and other cases.

Decree affirmed.

1. The threatened removal of engines from oil wells in active operation, considered as an emergency in which an application for a receiver may be made without notice: *Oil Run Co. v. Gale*, 6 W. Va. 525.
2. The 11th and 12th Geo. II, c. 10, does not authorize the appointment of a receiver over mines in the respondent's possession: *Frere v. Hibernian Co.*, 2 Hog. 30.
3. Receiver, when appointed at the instance of a minority of the stockholders of a corporation: *Hand v. Dexter*, 3 M. R. 608.
4. Receiver when appointed for property of mining partnership: *Roberts v. Eberhardt*, 11 M. R. 301.
5. A receiver may be appointed to preserve the property of a mining partnership, and to carry on its workings in a foreign country: *Sheppard v. Ozenford*, 1 Kay & J. 491.
6. The power of courts to take possession of property pending litigation, should not be exercised when the rights of third parties have intervened: *Levi v. Karrick*, 13 Iowa, 344.
7. Receiver denied where the party seeking relief had allowed expenditures, and stood by to see the fate of the adventure: *Norway v. Rowe*, 19 Ves. 144.
8. Application for receiver pending judgment in ejectment: *Whitney v. Buckman*, 10 M. R. 428.
9. Power of the court to instruct receiver, as to his management of mines: *Wilmington Co. v. Allen*, 9 M. R. 106.
10. The court will not appoint a receiver where it is no manifest benefit to either of the contesting partners: *Slemmer's App.*, 11 M. R. 437.
11. Facts justifying appointment of ; appointment upheld, notwithstanding void service on corporation : *St. Louis Co. v. Edwards*, 103 Ill. 472.
12. Decree appointing receiver may be treated as a final decree notwithstanding it reserves to the court the power of giving him further directions: *Winthrop Co. v. Meeker*, 109 U. S. 180.

MOXON, Appellant, v. WILKINSON, Respondent.

(2 Montana, 421. Supreme Court, 1876.)

Record excluded where not required by law. In ejectment for placer mining ground the plaintiff offered to prove that they had made a record: *Held*, that the statute of Montana requiring the record of "any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits," can not be construed to include a placer mine; that the record was therefore no link in the chain of title and hence not competent to be proved.

Locations of lodes and placers distinguished. The mining acts of the United States make a distinction between lode and placer claims, and a compliance with the law relating to the record of lode claims is not a means of perfecting title to a placer claim.

Acts of possession subsequent to filing. The rights of claimants of mining ground as to which application for United States patent has been made, can not be determined by acts subsequent to the filing of the adverse claim.

Domestic occupation not evidence of possession as mineral land. Proof of a dwelling house and blacksmith shop do not tend to show possession of land as mineral ground, and evidence of such facts is properly excluded in a suit for placer mining ground in support of an adverse claim.

¹ Variance—Averring a holding under district rules, when no district exists. When plaintiff declared for placer ground as held under rules of the mining district and it appeared that there was no mining district nor district rules, evidence of actual possession was excluded and the plaintiff held to be rightfully nonsuited.

Appeal from Third District, Jefferson County.

The judgment of nonsuit was entered by WADE, J.

JOHNSTON & TOOLE, for appellant.

CHUMASERO & CHADWICK, and SHOBER & LOWRY, for respondent.

BLAKE, J.

This action is brought to determine the right of possession to a tract of placer mining ground in Jefferson

¹ *Contra*, *Golden Fleece Co. v. Cable Co.*, 1 M. R. 120.

county, upon the surveyed subdivisions of the public lands of the United States. It is admitted by the pleadings that the respondents made their application to enter the premises in the United States land office at Helena, within the Territory, and that the appellants filed their protest and adverse claim. At the trial, the court excluded certain evidence offered by the appellants, and sustained the motion of the respondents for a nonsuit. We are asked to review this ruling.

The appellants allege in their amended complaint that they had and held their title and possession under the "rules, customs and usages of the miners in the district where said land is situated, and of the laws of the United States and of the Territory of Montana applicable thereto." The respondents deny these allegations in their answers. Did the testimony produced by the appellants tend to establish their material averments?

No evidence was offered tending to prove that the appellants had or held the property in controversy by virtue of any rules, customs or usages of any miners. On the contrary, the appellants testify that the ground in dispute is not in any mining district, and that there are no mining laws or customs governing its use or possession.

The appellants offered evidence for the purpose of proving that they made a record of the discovery of the premises in the office of the recorder of Jefferson county. It appears that no other record has been made by the appellants. This evidence was rejected by the court. The appellants maintain that the act of the legislative assembly, "providing for the location and recording of mining claims on veins or lodes," approved May 8, 1873, is applicable to placer mining ground: *Sts. Ex. Sess. 1873, 83*. If this proposition is correct, the record should have been admitted. This act requires a person to make and file in the office of the county recorder a statement of the discovery of "any mining claim, upon any vein or lode bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits." § 1. The technical words contained in this clause must be construed according to their peculiar and appropriate meaning: *Cod. Sts. 389*. In the language of miners, a lode is a vein containing ore. Veins are narrow plates of rock intersecting other rocks, and are the fillings of cracks or fissures.

The placers are superficial deposits, which occupy the beds of ancient rivers or valleys. This name was given by the Spaniards to the auriferous gravels of America: Dana's Geology; Simonin's Underground Life. A vein or lode of "valuable deposits" does not include a placer mining claim. This act was adopted as a substitute for the statute which prescribed the manner of locating and pre-empting quartz lodes or veins. We can not infer from the language of the amended act that the legislative assembly intended to affect placer mining claims, a subject on which the law-makers appear to be silent. There is no law of the Territory which requires the discoverer of a placer mining claim to make or file for record a statement respecting it. The instrument purporting to be a record of the ground in dispute, by the appellants, was not made and filed under the laws of the Territory or the United States, and could not be a legal notice of their rights to the respondents. It was not a link in the chain of their title and the court properly excluded it as incompetent evidence. *Mesick v. Sunderland*, 6 Cal. 315, and cases there cited.

In legislating upon these matters, Congress has recognized the distinction between lodes or veins of quartz and placer claims. The possessor of the former could procure the title of the United States a number of years before it was legal to grant a patent for the latter. The act was amended by providing that "claims, usually called 'placers,' including all forms of deposit excepting veins of quartz, or other rock in place," shall be subject to entry: Rev. Sts. U. S., § 2329. A vein or lode may be embraced by a placer claim, and the eleventh section of the act approved May 10, 1872, defines the proceedings which are necessary for the adjustment of the rights of the parties in the possession of the same: *Id.*, § 2333. The appellants did not offer any evidence that they had complied with the statutes of the United States relating to placer claims.

There is no testimony showing that any "valuable deposits" have been discovered upon the ground in controversy, or that any persons worked, improved or possessed the premises as a mining claim before this action was commenced. It does not appear that this tract is not agricultural land. The appellants offered to prove that they dug a ditch and made improvements, for the purpose of mining the ground, after the bringing of

the suit. The rights of the parties to the possession of the property at or prior to the time that the appellants filed their adverse claim in the land office can not be determined by the subsequent acts of the appellants. The court did not err in refusing to allow testimony concerning these facts to be introduced.

It is claimed that the court erred in excluding the evidence of one of the appellants, showing that he had upon the premises a house, in which he lived, and a blacksmith shop. These improvements appear to have been made for the purpose of carrying on a trade. The character of the possession, which the appellants seek to prove by this testimony, is not consistent with the title which they are trying to maintain in this proceeding. The construction of the house and shop does not tend to show that this appellant possessed the land as a miner, or that it is mineral ground. Conceding the facts to be stated correctly by the appellants, we do not think that they impair the rights of the respondents, or any persons claiming the property for mining purposes.

The appellants failed to prove the material allegations of their complaint, that their possession is under the rules and customs of the miners in the district containing the placer claim and the laws of the Territory and the United States, and it was the duty of the court to grant the motion for a nonsuit.

Judgment affirmed.

FLAHERTY ET AL. V. GWINN ET AL.

(1 Dakota, 509. District Court, Lawrence County, 1878-79.)

District rules may be shown to be in force by custom or usage, without proof of their adoption at a miners' meeting, or a written record thereof.

¹ **District rule must bind all.** Where there is a local usage requiring a record of claims to be made, whether by resolution passed at a miners' meeting or otherwise, proved to be in force, it is obligatory upon all, and not optional.

¹ *Jupiter Co. v. Bodie Co.*, 4 M. R. 413; *Southern Co. v. Europa Co.*, 9 M. R. 513.

Must be specific. District rules imposing conditions upon miners in addition to those imposed by the statutes of the United States, must be clear and positive in their character, not resting upon inference or presumption.

The record books of a mining district are admissible in evidence as tending to prove affirmatively the existence of a local custom making the recording of claims obligatory.

Defendant's counsel offered in evidence the record books of the Whitewood Quartz Mining District, containing the record of the location of quartz mines since the organization of the said district, in February, 1876, for the purpose of tending to show that there was, during a certain time, a custom among the miners of said district, established and in force, requiring such locations to be recorded with the mining recorder of said district. To the introduction of this evidence the plaintiff's counsel objected upon the ground of irrelevancy and incompetency.

Opinion of the court; GRANVILLE G. BENNETT, P. J.

Upon the question presented by the objection, while the argument of counsel has been able, and showed evidence of much research, my mind is not altogether clear as to its full scope and ultimate bearing, but I have come to a conclusion satisfactory to myself so far as it is properly before me. The Supreme Court of Nevada, in the case of *Golden Fleece Co. v. Cable Co.*; 12 Nev. 312, seems to have settled very clearly and definitely some points under the U. S. Mining Act of May, 1872. The court in the case say: "Proof of a record is totally irrelevant without proof of some regulation making a record obligatory or giving it some effect."

Now there are more ways of proving a rule or regulation of miners, than by the act of the miners in their meetings or by a written record. Such rule or regulation may be established and shown to be in force by custom or usage. But the court in the case referred to further say: "The public law does not of itself create any such office as that of mining recorder. Neither does it make the recording of claims obligatory or give to a record any effect. This is a matter left to the miners of the respective districts. If they make no rule requiring a record, none is required; if they give no effect to a record, evidence of a record is irrelevant." Regarding this as I do

as a clear and correct statement of the law, it seems clear that any rule or regulation established by miners, whether it be in writing or by verbal resolutions passed in their meetings, or by usage and custom, must be binding and obligatory, and if it provides for the recording of claims with the district recorder, it must make such recording obligatory, and not leave it to the option of the locator as a matter of convenience or precaution. In other words, it must be of a character that if complied with will give to the party recording some right under it, and if neglected deprive him of some right that he would otherwise, or in the absence of the rule, obtain. In the case above cited the court again say: "The mining laws of the United States, R. S. Secs. 2318 to 2346, recognize and sanction the custom long prevalent among the miners of this coast, of organizing mining districts and adopting local laws or rules governing the location, recording and working of claims. Existing rules not in conflict with State or Federal legislation are ratified, and express authority is conferred upon miners in their several districts to adopt other rules subject to certain specified restrictions. Miners are thus permitted to make rules in addition to those prescribed by Congress; but in order that mining claims may be held and the government title acquired, it is not essential that mining districts should be organized and local rules adopted. All that the government requires to be done, in order to obtain its title or license to occupy, is prescribed by law, and, in the absence of local rules, a compliance with the public law will secure the claim. The miners in their respective districts, may, if they choose, exact something more, but they are not obliged to do so, and no court, in the absence of proof, will presume that they have done so." Now, in order to deprive a party of the right to property which he is enabled to acquire by a compliance with the provisions of the statutes of the United States, by the imposition of any additional burdens or obligations imposed by rules and regulations of miners, such rules and regulations must be clear and positive in their character and requirements, and must not rest in inference or presumption; they must impose an obligation to do some certain and specific act, which if not complied with, will, by the terms of the rule, deprive the locator of some right.

Where miners, in their experience, deem some additional rule or regulation requisite providing for some additional act thought necessary for the better protection of the miner and his rights in mining property, there is no doubt in my mind but that it is entirely competent for them to establish such rules and regulations, provided they are reasonable and do not conflict with Federal or Territorial legislation, and attach penalties for their violation.

Now, if it was the custom of miners to record all claims located in the office of the mining recorder of the district, that fact is proper to be given in evidence as one act only, tending to prove a local rule or regulation, making the recording obligatory. What weight it may be entitled to, or just how far it may tend to establish such rule, is not now under consideration.

From an examination of the authorities, I am satisfied that the records offered in evidence are competent for the purpose of proving the custom of miners with reference to recording claims, and may be introduced for that purpose. Counsel has advised the court that they intend to follow it up with other evidence, tending to establish a rule making recording obligatory.

The objection is overruled.

1. As to effect of mining as notice of possession, where the party in possession has failed to record his deed, see 12 M. R. 268, note.

2. Locators are not bound by mistake of the recorder: *Myers v. Spooner*, 9 M. R. 519; *Weese v. Barker*, 7 Colo. 178.

3. Proof of lost mining records: *McGarrity v. Byington*, 2 M. R. 311; *Belk v. Meagher*, 1 M. R. 510.

4. Record of claim, when required, and requisites of: *Golden Fleece Co. v. Cable Co.*, 1 M. R. 120; *Southern Cross Co. v. Europa Co.*, 9 M. R. 513; *North Noonday Co. v. Orient Co.*, Id. 530.

5. Record with district recorder not essential, though required by district rule, the rule not providing for forfeiture in case of default nor when registered with county recorder: *Johnson v. McLaughlin*, 3 W. C. R. 178, 1 Ariz. 493.

6. Defective record may be cured by proper monuments on the ground: *Russell v. Chumazero*, 4 Mont. 309. What are proper monuments is a question for the jury: *Id.*

See LOCATION CERTIFICATE.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND V.
NORTH EASTERN RAILWAY CO.

(Law Reports, 4 Ch. Division, 845. High Court of Justice, 1877.)

Facts of the case—Railway company mining and breaking barriers.

Plaintiffs, owners of a coal mine, claimed damages against the owners of an adjoining mine for breaking down their barriers and working across the bounds. The wrongful acts were committed in 1863, while such adjoining mine was worked by the Hartlepool Railway Company. The boundaries of the two mines had been settled by mutual agreement in 1862, and after lengthy negotiations a mutual release was executed in 1864, by which all wrongful acts of both sides were condoned.

In 1863 an act of Parliament was passed, under which said Hartlepool Railway Company were to sell their mines within five years, and in 1865 it was amalgamated with the defendant company, and all its assets and liabilities transferred to them. *Held:*

Mining ultra vires—Responsibility of corporate successor. 1. That although it was *ultra vires* of the railway company to work mines the act of 1863 implied that the company were to work their mines until sold, and that upon the amalgamation with the defendant company the latter became liable for the wrongful act of their predecessors.

Breach of faith avoid: release. 2. That the wrongful acts committed in 1863 were not condoned by the release of 1864, the plaintiffs having no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken.

Statute of Limitation, where facts not known. 3. That the Statute of Limitations did not begin to run until the time of the discovery of the wrongful acts, there being no *laches* attributable to the plaintiffs for not having discovered the damage prior to 1870, two years before the filing of the bill.

Value without deducting cost of getting, taken to be the rule in admitting damages—there having been a taking with knowledge.

This was a bill filed on the 20th of June, 1872, by the Ecclesiastical Commissioners for England and their present lessees, Messrs. Stobart & Morton, against the North Eastern Railway Company for an account of all coals and other minerals worked by the West Hartlepool Harbor and Railway Company before that company was transferred to the North Eastern Railway Company, from a colliery of the plaintiffs in the county of Durham called the Newton Cap colliery,

¹ *Maute v. Gross*, 11 M. R. 123; *Chicago Ry. v. Lewis*, 109 Ill. 120.

² See *Williams v. Pomeroy Co.*, 6 M. R. 195; *Nat. Copper Co. v. Minn. M. Co.*, 23 N. W. Rep. 781.

and of the coal which the company had rendered unworkable, without any allowance for the cost of working such coal, and for payment of the amount due on taking such account, and to ascertain the damages sustained by the plaintiffs by reason of the West Hartlepool company having broken through the boundary between the Newton Cap colliery and the defendants' colliery called the Hunwick colliery.

The following were the facts of the case:

The Bishop of Durham had very extensive estates in the county of Durham. These estates had now become vested by act of Parliament in Ecclesiastical Commissioners for England. The colliery owned by the commissioners was called the Newton Cap colliery, and the colliery held by the West Hartlepool company, which adjoined it, was called the Hunwick colliery. In 1846 the Newton Cap colliery was demised by the then Bishop of Durham by a lease dated the 31st of December, 1846, to the predecessors in title of the co-plaintiffs, Messrs. Stobart & Morton, for three lives, two of which were still in existence. The lease contained the usual covenant that a barrier of forty yards should be left between it and the adjoining colliery, and a similar covenant was contained in the lease of the Hunwick colliery. The Hunwick colliery belonged to Mr. Matthew Bell, and was leased by him on the 8th of September, 1856, to Messrs. Jackson and Hodgson, and Jackson became afterward solely entitled to the colliery, and he assigned it to himself and Messrs. Watson & Wood, as trustees for the West Hartlepool company. Under these circumstances Messrs. Stobart & Morton were lessees of the Newton Cap colliery, and the West Hartlepool company were lessees of the Hunwick colliery. Both of them were large collieries, one of them being capable of working 600 tons of coal a day and the other 500 tons.

In 1862 questions arose as to the boundaries of these two collieries, and it was then ascertained that some part of the Newton Cap colliery was in point of fact described on the Hunwick colliery plan as being within the bounds of that colliery. This led to investigation, and through the instrumentality of Mr. W. S. Stobart, whose father was a partner in the Newton Cap colliery, it was ascertained that certain land which undoubtedly belonged to the Newton Cap colliery, was described as being within the bounds of the adjoining colliery.

In consequence of this Mr. Johnson, who had been for many years the surveyor, manager and principal agent of the West Hartlepool company, and also Mr. Bell, the lessor of the Hunwick colliery, investigated the matter and the result was that a new map, accurately describing the boundaries, was drawn up, and it was then ascertained that there were three properties, namely, Councillor's Copyhold, Ward's Leasehold and part of Hunwick Lane, which had been described as being within the bounds of the defendants' colliery, when in point of fact they belonged to the plaintiffs', or Newton Cap colliery. This having been set right by the new map, it was considered that at that time, namely, in 1862, all questions between the parties were, as far as any disputes had arisen as to the boundaries and as to the working into each other's properties, settled; and according to the evidence, it appeared that up to that time no coal belonging to the owners of the Newton Cap colliery had been actually worked or removed by the defendants.

After this a long correspondence took place between the parties, ending in May, 1864, the result of which was that an agreement was executed, dated the 11th of May, 1864, between a Mr. Armstrong, as representing the West Hartlepool company, and Mr. Stobart, for himself and partners, under the name of the North Bichborn Coal Company, providing for certain things to be done in respect of the collieries and ending with this clause: "It is mutually agreed by and between the undersigned parties hereto, that in consideration of the above, all claims on account of damage of every kind, and whether by trespass or otherwise, by either party, be condoned and discharged from the signing of this agreement."

It further appeared that in 1863 an act of Parliament was passed for the purpose of conferring additional powers on the West Hartlepool company and for regulating the debenture debt and capital of the company, and by the 51st section of that act it was provided, "Within five years after the passing of this act the company, or as the case requires, the trustee for the company, to the extent of the estates, shares, rights, or interest of the company, in all collieries in which the company now have any estates, shares, rights or interests may and shall sell and absolutely dispose of the same, either by public auction or by private contract, and on such terms and condi

tions as the company shall think proper, and the net moneys produced by the sale and belonging to the company shall, so far as they extend, be applied only in paying off principal moneys then secured by debentures of the company, or in the redemption of redeemable class A stock."

In 1864 the collieries in the occupation of the West Hartlepool company, including the Hunwick colliery, were sold to two gentlemen named Lancaster and Brogden, for the sum of £25,000, and the purchasers having paid a deposit of £5,000, entered into possession of the colliery on the 8th day of August, 1864.

In 1865 an act of Parliament was passed for the amalgamation of the undertakings of the West Hartlepool company and the Cleveland Railway Company, with that of the North Eastern company, and thereby the West Hartlepool company was dissolved, and all the property, the benefits of contracts and other interests belonging to the Hartlepool company were transferred to the North Eastern company, but subject to all existing contracts, debts, liabilities, engagements and obligations affecting the same respectively, and to the payment or discharge, performance or observance thereof by the latter company.

The alleged working of the plaintiffs' coal by the West Hartlepool company was not discovered, according to the statements of the plaintiffs, until October, 1870, when, in the course of working their coal, they found that large quantities of coal had been taken away by the defendants, amounting in value to several thousand pounds.

A correspondence then ensued between the parties; and ultimately the plaintiffs, who alleged that they could not find out the mischief done earlier than October, 1870, instituted this suit.

A number of affidavits were filed on both sides, and some of the witnesses were cross-examined. The result of the evidence was this: Gardner, the overseer of the Hunwick colliery, stated that under a mistaken view that Councillor's Copyhold and the other lands were included in the demise to the defendants, he had, in 1863, directed Dixon, the overman of Hunwick, to work directly into Councillor's Copyhold. Dixon stated positively that no coal had been worked from Councillor's Copyhold prior to 1863, and he proved by the

yard book or books showing the daily workings of the colliery, that in the month of January, 1863, he commenced working under this property; that he worked all the pillars as well as the walls, and left all such part in goaf, that is, completely worked out so as to let the surface down, and that the whole of the coal was so worked out before the beginning of the year 1864. There was also evidence to prove the nature of the damage which the plaintiffs would suffer upon the termination of the defendants' lease by means of the flow of water from a river close by in consequence of the barriers between the two collieries having been destroyed by the defendants.

GLASSE, Q. C., HASTINGS, Q. C., and BORRETT, for the plaintiffs.

During their argument on the question of damages the vice chancellor said:

"If I should decide in your favor, probably the better mode of ascertaining this damage will be by reference to the arbitration of some skilled person."

This proposal was not objected to by counsel on either side.

BRISTOWE, Q. C., and WILLIAMSON, for the defendants.

Jan. 24th. MALINS, V. C.

This bill was filed by the plaintiffs, seeking relief against the defendants in consequence of the boundaries of the colliery having been broken and the coal worked under certain closes of land which were included in the lease to Messrs. Stobart & Co., and which, it was alleged, were worked by the West Hartlepool company before the property was transferred to the North Eastern Railway Company, under which the plaintiffs contended that the North Eastern company are liable.

And the bill also seeks to recover damages for the consequence of their having broken down the barrier between the two collieries, which it is said is of great importance, and has occasioned great damage to the plaintiffs. The case, which has occupied four days in argument and in hearing the evidence, has been very elaborately argued, and everything has

been said on both sides that could be said in the interests of the respective clients, and I have now to decide it.

It may, I think, be assumed that all questions which had arisen up to the 11th of May, 1864, when the agreement was signed between the owners of the adjoining collieries, were then settled, and if the plaintiffs had notice that the coal under Councillor's Copyhold, Ward's Leasehold, and Hunwick Lane had then been worked, I should have been of opinion that this suit could not have been sustained, because it would have shown distinct knowledge at that time; and although it is not in terms a release, yet, looking at the correspondence and all that passed, I think after the expiration of six years the plaintiff would have been barred from any right to sue for what had been done. But I am of opinion, upon the evidence, that they did not know the fact, and had no reason for suspecting it. Mr. Bristowe, on the part of the defendants, admits that coal had been worked under Councillor's Copyhold—that, in fact, it had been absolutely worked out and become goaf; that is, they have not only worked and taken out all they could, leaving proper pillars, but they have worked backward, let the surface down, and it is what is technically called goaf. I am satisfied from the evidence that coal has also been worked under Ward's Leasehold and under Hunwick Lane. It was argued strenuously by Mr. Bristowe that although he could not deny that the coal had been worked from Councillor's Copyhold, there was nothing to show when it was worked; and therefore I suppose he desired me to infer that it might have been done before the West Hartlepool company had anything to do with the concern, but I think the evidence proved that point beyond a possibility of doubt. The way in which it was done is shown distinctly by the evidence of Gardner, the overseer of the Hunwick colliery, who says that he directed Dixon, the overman, to work directly into Councillor's Copyhold. That was in the year 1863. Therefore, if Gardner's evidence is to be relied on, it shows distinctly that it was done by the West Hartlepool company, and before the document which is called a release of the 11th of May, 1864; but I am satisfied that at that time the fact of its having been done was not known to the plaintiffs. How it was that Gardner, a subordinate officer, gave these directions to work into these prop-

erties after the plan had been settled, is difficult to understand. I do not make any imputation upon Gardner; there was no improper intention; and, indeed, the consequence of breaking bounds into an adjoining colliery is so serious, and throws such liabilities on those who break the bounds, that I must assume, although it is clear that this was done, it was done under a mistake, and not with any improper intention to take away from their neighbors that which belonged to them and not to themselves. Then the time at which it was done is distinctly shown by the evidence of Dixon, the overman, who says that he knows of his own personal knowledge that when the West Hartlepool company took the Hunwick colliery in February, 1860, none of the coal comprised within Councillor's Copyhold had been worked, and he is quite positive that no portion of such coal had been worked until the year 1863. Now, if I believe this witness—and I am bound to do so, since he was not called for cross-examination, and there is no imputation on him—that proves the case of the plaintiffs. Then he shows distinctly, by the book called the yard book, that in the month of January, 1863, he commenced working under this identical property; that he worked out all the pillars as well as the walls and boards, and left all such part in goaf, and that the whole of the coal was so worked out before the beginning of the year 1864.

This, therefore, makes it perfectly clear that it was in the year 1863 that this colliery was worked, and that was during the time the West Hartlepool company was working it. If, therefore, I had the West Hartlepool company here instead of the North Eastern company, I take it to be perfectly clear on this evidence that I should be bound to come to the conclusion that the coal under the plaintiffs' land had been worked by the West Hartlepool company, and that they would be answerable for the consequences of what they had done. The breaking of the barrier or boundary of the plaintiffs' colliery is, therefore, in my opinion, clearly established, because they could not break into any of this coal without breaking that barrier of forty yards, which ought to have been left, and which would have been, as all the witnesses agree, a perfect protection to the Newton Cap colliery from any inundation of the adjoining colliery, whatever the amount of water may have been. Therefore, up to this point, I have come to

the conclusion that the coal has been worked by the West Hartlepool company under the plaintiffs' lands in question, and that the West Hartlepool company, if they were here, would clearly be liable for the consequences of what has been done.

But Mr. Bristowe, on behalf of the defendants, rests his defense on the effect of the release of the 11th of May, 1864, and he says that the acts of the West Hartlepool company were *ultra vires*. It is said, with truth, that, inasmuch as they were a harbor and railway company, they had no parliamentary power to work collieries, that it was altogether beside the object of their incorporation, and that what they did was *ultra vires*. That it is *ultra vires* of a railway company or harbor company to work collieries does not and can not, in my opinion, admit of the slightest doubt, and therefore I am very clearly of opinion with the defendants to that extent that the workings of these collieries by the West Hartlepool company were altogether unauthorized; and if matters had so rested possibly that would be a defense available to the North Eastern company, who are the successors in title to the West Hartlepool company. But these matters having come before Parliament in 1863, when the West Hartlepool company desired to obtain additional powers, an act was passed in that year, which does not in terms recite the fact that the West Hartlepool company were working collieries, but it does that which is equivalent to it, and, in my opinion, most distinctly legalizes, by the 51st section, the holding of these collieries by the company, because it gives the company power to sell and absolutely dispose of all collieries and coal royalties in which the company had any interest on such terms and conditions as the company should think proper. Therefore this authorizes them within five years to sell the colliery. That recognizes the fact that they had collieries to sell, and having collieries to sell, it recognizes the fact that they were working collieries, and having authorized them to sell those collieries within five years, I agree with what Mr. Graham Hastings said in his opening, that that is an implied authority for the West Hartlepool company to work the colliery during the period within five years up to the sale taking place. From 1863 to 1868, therefore, they are authorized by act of Parliament, in my opinion, to work collieries, and that which was *ultra vires* up to that

time by this act of Parliament became legal, and they were the legal and authorized owners of the collieries, and were authorized at any time within that period to sell them, as sell they did. That, I think, disposes of the question of *ultra vires*.

Then what took place with regard to these collieries was this: it became expedient and for the interest of the North-Eastern company to amalgamate with this West Hartlepool company, and accordingly they obtained an act of Parliament authorizing the amalgamation. At that time what was their situation with regard to these collieries? The West Hartlepool company up to that time, viz., 1864, at all events, had continued to work the collieries. They had sold them in round numbers for £25,000, to two gentlemen named Lancaster and Brogden. Lancaster and Brogden, it appears, entered into possession of this Hunwick colliery on the 8th of August, 1864. But it appears that at that time they had only paid a deposit of £5,000, and that the whole purchase money was not paid. Therefore the situation of matters at that time was this: that the West Hartlepool company, to a certain extent, had ceased to be the owners of the colliery, because they had sold it to Lancaster and Brogden; but they had a lien for the unpaid purchase money, amounting in round numbers to £20,000, and in this state of things they had some interest. There were other collieries which, I imagine, were unsold, because by the balance sheet submitted to the shareholders of the North Eastern Railway Company at a half-yearly meeting, in February, 1868, among other assets, there was a large amount to be received for collieries. That shows, therefore, that their assets consisted in part of the sum to be received from the West Hartlepool company for purchase money either for the collieries already sold to Messrs. Lancaster and Brogden, or for some other collieries. In this state of things the act of Parliament for the amalgamation of the companies passed, and on the passing thereof the West Hartlepool Harbor and Railway Company were dissolved, and all the property, the benefits of the contracts, and everything which the West Hartlepool company had was transferred to the North Eastern company, but subject to all existing contracts, debts, liabilities, engagements and obligations affecting the same respectively,

and to the payment or discharge, performance or observance thereof by the company.

I read this act of Parliament as amounting to this: that whatever liabilities the West Hartlepool company were under with respect to the property, were transferred to and then became the liabilities of the North Eastern company, and in this way, whatever liability attached to the West Hartlepool company before these acts, now attaches to the North Eastern company.

The liability of the North Eastern company being in this manner established, the point which was mainly relied upon by Mr. Bristowe, and upon which the great stress of his argument was laid, was the Statute of Limitations. With regard to the Statute of Limitations, independently of my decision, I should desire to look at it in a common-sense point of view, in a view in which such things ought to be dealt with. If a wrong is done under the statute of James, an action for trespass can only be maintained like any other action at common law within six years after the act done; and accordingly, in the case of *Hunter v. Gibbons*, 1 H. & N. 459, where I think an action was brought for a wrong done more than six years before, which had not been discovered, the plaintiff attempted to get out of the difficulty by an equitable plea, but the court of exchequer would not allow an equitable plea, and the Lord Chief Baron Pollock said that if they wanted that, they must go to a court of equity, which would, in his opinion, not be bound by the Statute of Limitations. Take the common case: suppose A is the owner of an estate under which it is well known there is a valuable seam of coal, or many seams of coal, and that B is the owner of an adjoining estate containing the same seam or seams of coal. A, in perfect security, not desiring at present, for various reasons which might be suggested, to sink shafts upon his property, keeps it, as he believes, intact. B, his neighbor, all this time works actively and raises, as in the present case, hundreds of tons of coal a day. A, believing that all the coal he sees being raised by B comes from under his neighbor's estate, and in perfect security, says: "This is so profitable an operation which my neighbor is carrying on, that I am inclined to do the same;" and he accordingly authorizes a shaft to be sunk, and then discovers that for more than six years a large

portion of his coal has been worked by his neighbor. It is argued that under those circumstances he has no remedy, because it was done more than six years ago, although he did not know it and had no means of knowing it, because he could not look through the solid earth, and could not have found it out without having recourse to that which would be totally uncalled for and unjustifiable on his part, namely, asking to go down his neighbor's pit to see that they were not doing that which he had no right to assume they were doing. It is gravely argued that under these circumstances he has no remedy. But it has been the settled rule of this court for more than a century, that wherever there is fraud, and this would be fraud, the time begins to run only from the discovery of the fraud, and most reasonably, because on what principle is it that the Statute of Limitations is a bar? Because it is considered that there is *laches* on the part of the person suing. If he has had a right for more than six years, and it is known he has had that right, to lie by for six years, or any other number of years prescribed by the Statute of Limitations, is *laches* which is binding on him; and therefore, if he will lie by, the statute runs against him; but how can there be any *laches* when he does not know of the act done?

The case of *South Sea Company v. Wymondsell*, 3 P. Wms. 143, is a leading case on the subject, and appears to me to proceed on the clearest principles. There the fraud had been committed long before, but had then been discovered within six years, and the decision was, that although the fraud had been committed more than six years, as it was discovered within six years, the time only began to run from the discovery; that is, the time when the plaintiff was first guilty of *laches*.

Now we all know that before the 3 and 4 Will. 4, c. 27, the Statute of Limitations was not binding in courts of equity; but as Lord Redesdale expresses it in *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 630, where there is no fraud, or any particular circumstances, courts of equity act not merely by analogy but in obedience to the statute. Therefore where there is no fraud, that which would be binding in a court of law would also be binding in a court of equity, and consequently twenty years was a bar to claims in equity, because that period would be a bar at law; but in a passage from Lord

Redesdale's judgment in *Bond v. Hopkins*, 1 Sch. & Lef. 429, he says: "Nothing is better established in courts of equity * * * than that where a title exists at law and in conscience, and the effectual assertion of it at law is unconscionably obstructed, relief should be given in equity; and that where a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity. Both these cases are considered by courts of equity as affected by the Statute of Limitations; that is, if the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute, the court, acting by analogy to the statute, will not relieve. If the party be guilty of such *laches* in prosecuting his equitable title as would bar him if his title were solely at law, he shall be barred in equity." But equity will remove the legal bar proceeding from lapse of time as it would any other legal advantage if sought to be used unconscionably. That is all the relation this statute has or ought to have on proceedings in equity.

The same principle is acted on in a case of *Brooksbank v. Smith*, 2 Y. & C. Ex. 58. That was a case upon the discovery of a mistake. The mistake had been committed much more than six years before, but had been discovered within the six years, and the question was whether a suit to correct the mistake could be maintained. Mr. Baron Alderson says: "Then is the Statute of Limitations a bar to the remedy sought by this bill? It seems to me that it is not so. The statute does not absolutely bind courts of equity, but they adopt it as a rule to assist their discretion. In cases of fraud, however, they hold that the statute runs from the discovery, because the *laches* of the plaintiff commences from that date, on his acquaintance with all the circumstances." *Laches*, therefore, can not run until the facts are known.

Then Mr. Bainbridge, in his very learned and able treatise on the Law of Mines, 3d Ed., p. 611, discusses the law upon the same principles, and cites, in support of what he lays down as the law, the cases of *Denys v. Shuckburgh*, 4 Y. & C. Ex. 42; *Hunter v. Gibbons*, 1 H. & N. 459, and *Dean v. Thwaite*, 21 Beav. 621, and many other authorities.

The law therefore is, I think, clearly settled that in cases of

fraud the Statute of Limitations does not begin to run until the fraud is discovered; and although it is not necessary in this particular case to come to the conclusion that what was done was done fraudulently, yet for the purpose of this distinction between cases which are fraudulent and cases which are not—although, I repeat, I may be distinctly of opinion that neither the West Hartlepool company (and as a corporation they could not commit a fraud) nor their agents, who were incapable of doing so, intended to commit a fraud—yet for the purposes of the statute, the breaking of bounds into your neighbor's colliery must be considered a fraudulent act; and therefore it is now clearly by these authorities settled, in my opinion, that in all cases of fraud the time for barring the statute begins to run only from the time the fraud was discovered, or by reasonable diligence might have been discovered.

Then it is said that in this case by reasonable diligence this fraud might have been discovered in 1864. Now, this is a part of the argument of Mr. Bristowe which made the most serious impression on my mind. He says these parties carried on a long negotiation from 1862 to 1864. It was known that in 1862 there had been a mistake as to the boundaries; the Hunwick collieries had been worked very extensively ever since; and in 1864, by reasonable diligence, they might have discovered that these particular lands had been worked under, by the neighboring colliery. Now, this depends a great deal upon the inquiry a man is bound to make. I do not refer to it in detail, but the learned counsel engaged in the case will remember very well the distinct manner in which Johnson gave his evidence. He described the circumstances under which the new boundary map was prepared in 1862. It is said that in 1864 they might have made inquiry whether this land had been worked under between 1862 and 1864. In 1862 these boundaries were settled, and in 1864 this apparent settlement of all differences took place. Now, was there anything to lead them to believe or suspect, or were they bound to suspect or make inquiries as to whether these boundaries which had been so formally settled by the agents of the West Hartlepool company in 1862 had been broken into or transgressed between 1862 and 1864? It now turns out from the evidence

of Mr. Dixon and Mr. Gardner that the bounds were in point of fact broken, and the coal abstracted in 1863. Mr. Dixon said it was all done before the first of January, 1864; that it began in 1863 and ended 1863. At the time, therefore, when this correspondence was taking place, one side knew, undoubtedly. The agents of the Hunwick colliery, which is the West Hartlepool company, knew perfectly well that they had broken the bounds, that they had worked the coal under Councillor's Copyhold and under Ward's Leasehold, and under Hunwick Lane. Did they communicate that fact? That is not pretended. Did the other side know it? There is not a particle of evidence to show they did. Mr. Bristowe says they ought to have made inquiry. Are you bound to make inquiry of your neighbor whether he has robbed you or not? If you have a neighbor and treat him as a respectable person who would not do so improper an act, I can not conceive that there can be any necessity on the part of the plaintiffs to make the inquiry, "Have you violated these boundaries which we settled in 1862? Did you, in 1863, in defiance of all that, break the bounds and carry away 100,000 tons of our coal, and break our barriers so as to expose us to inundations from your colliery?" I can not consider that reasonable diligence required it. Therefore, inasmuch as one party did know it, and might have communicated it and failed to do so, and the other party did not know it, I am of opinion there was nothing calling for inquiry on their part, and that there was no want of reasonable diligence in their not discovering, in 1864, that which they might have discovered. I think there was no necessity to take any steps of that kind; and therefore I can not come to the conclusion which Mr. Bristowe desired I should do, that it might have been discovered, with reasonable diligence.

There was one case I passed over which I intended to mention—the case of *Backhouse v. Bonomi*, 9 H. L. C. 503. That decides that where by the working of a colliery that had been done at a more remote period than six years, which caused an injury to occur within six years, the action could be maintainable within six years from the time of the injury being done. The questions put to the learned judges by Lord Westbury were these: "A B is the owner of a house; C D is the owner

of a mine under the house and under the surrounding land; C D works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can A B bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?" The learned judges retired to consider the question, and the lord chief baron then said: "My lords, I am desired by my learned brothers to deliver our unanimous opinion in reply to your lordship's question. We are all of opinion that A B may bring an action at any time within six years after the mischief done, and we are of that opinion for the reasons given in the judgment of the Court of Exchequer chamber." That was adopted by the House of Lords, and it was decided that the action was maintainable.

The case which Mr. Bristowe relied on in support of his argument was the decision of the case of *Denys v. Shuckburgh*, 4 Y. & C. Ex. 42, which I must say appears to me to lay down the very reasonable rule that you may maintain an action after the expiration of six years, if you did not know, or had not reasonable means of knowing, the fact. Six years will only be a bar when you have knowledge, or by reasonable diligence might have obtained knowledge. It resolves itself into a question of fact, whether there has or has not been a want of reasonable diligence in making the inquiry. For the reasons I have stated there was no want of reasonable diligence in this case, and therefore this authority of *Denys v. Shuckburgh* does not apply.

But very great reliance was placed on the decision of Lord Romilly, the master of the rolls, in the case of *Dean v. Thwaite*, 21 Beav. 621. The case is, as Mr. Glasse says, very shortly reported, and the facts are very meagrely stated. They are these: "The plaintiff's estate adjoined that of the defendant. The defendant's husband, prior to his death, in 1851, and the defendant subsequently, had, in working their own collieries, passed into and worked the plaintiff's coal, and this, it was alleged, had been done since 1840. The plaintiff filed the bill against Mrs. Thwaite and the representatives of her husband for an account of the coal thus improperly taken, and for pay-

ment of the value, and for an injunction." The time when this was discovered is not stated, and the circumstances are not stated. There is merely the broad fact that, from 1840, this suit being heard in 1855, these workings into the plaintiff's colliery had been going on. "Mr. Roundell Palmer and Mr. Cairns, for the plaintiff, asked for a general account, contending that the Statute of Limitations did not apply to the case of a concealed fraud, and that time only ran from the discovery of the wrong." (They cited *Brooksbank v. Smith*, 2 Y. & C. Ex. 58; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Hoven-den v. Lord Annesley*, 2 Sch. & Le. 629, 630; *Booth v. Earl of Warrington*, 4 Bro. P. C. (Tom. Ed.) 163; and *Blair v. Bromley*, 5 Hare 547; which was a case of fraud with regard to a trust fund.) There the master of the rolls, on the facts stated, lays down a rule which I confess I can not concur in. He says (21 Beav. 622): "The question of liability with respect to the working of minerals underground which can not be perceived in the same way as operations upon the surface, stands, in my opinion, in a very peculiar light; and it is very important to consider upon whom the burthen of proof lies in a case of this description. In my opinion the burthen of proof lies upon the wrongdoer to show that the coal has not been taken from the plaintiff's property within the time during which this court would make him accountable for it. It was impossible for the plaintiff to ascertain that fact; it was solely within the knowledge of the defendants and their workmen."

This seems to assume that the burthen of proof is on the wrongdoer, but it also seems to assume that if the wrongdoer proves that all the coal that was taken away was taken more than six years ago the plaintiff has no remedy. That is too broad, in my opinion. If it was taken away more than six years ago, and the plaintiff knew that, or had the means of knowing it, then it is very reasonable that the statute should be applied; but, according to this, although in the case I have suggested a man may have an estate which he believes to be untouched; and his neighbor may have robbed him more than six years ago, but he does not find him out, according to this decision he may rob him successfully, because the Statute of Limitations applies, and there is no remedy. That, in my opinion, lays down the rule far too broadly.

If Lord Romilly meant to say, 'let him prove that it was done more than six years and the plaintiff knew it,' then it is certainly in accordance with all the other decisions, and with my view of the case. His lordship reserved his decision, and on the following day said: "I retain the opinion which I expressed yesterday, that an account ought to be directed, but that it must be confined to the coal gotten within six years before the filing of the bill." If that is laid down as an unqualified rule, it is one in which I can not concur; but upon the whole I think the real ground upon which the master of the rolls refused to give more than an account for six years was that there was *laches* on the part of the plaintiff; that he either did know, or by reasonable diligence might have known, that the wrong had been done, and that he was guilty of that negligence which made it proper that the statute should run against him.

Upon these grounds I have come to the conclusion that this defense of the Statute of Limitations entirely fails the defendants, and that there was no knowledge on the part of the plaintiffs, nor any reasonable means of acquiring knowledge, and no omission to ascertain their rights, and no failure to resort to reasonable means of doing so; and I am therefore of opinion that although a wrong was done in 1863, inasmuch as it was not discovered till 1870, the bill was properly filed within six years from that time, namely, in 1872.

Now with regard to the mode of discovery, it appears by the evidence that the owners of the Newton Cap colliery in the ordinary prosecution of their business went on with their workings toward Councillor's Copyhold and Ward's Leasehold, and to this lane in question. When they got there, to their surprise they found the coal had all been worked out. There ought to have been between Councillor's Copyhold and the Hunwick colliery a barrier of forty yards. That barrier had of course been worked through, in order to get into Councillor's Copyhold, and toward Ward's Leasehold the same, and Hunwick Lane the same. This led to a correspondence between the parties, and it was finally ascertained, in 1870, that the coal had been worked under those lands, and that the bounds had been broken in the manner I have stated.

There is only one point I have passed over, which was this:

I pointed out that the North Eastern company acquired the right to these lands which the West Hartlepool company had sold to Lancaster and Brogden; and that the West Hartlepool company had received only a portion of the purchase money in the shape of a deposit. The bulk of the purchase money was received by the North Eastern company. That seems to have been wholly unknown to the defendants' advisers till Mr. Borrett produced the deed and read the recitals in it. The conveyance is dated the 8th of August, 1870, no less than six years after Lancaster and Brogden entered into possession. when, to my mind, it is clear they had not paid the purchase money, because if they had, they would undoubtedly have taken a conveyance of the estate. On the 8th of August, 1870, the receipt of the purchase money of £20,000 and upward was acknowledged by the railway company under their corporate seal in the usual way. The money was paid to them, and therefore it is clear they get the advantage of the purchase money for this colliery. They had all the advantage except the deposit of £5,000 paid to the West Hartlepool company, and with the property they must, in my opinion, take the burden, and take it subject to all contracts, liabilities debts and engagements affecting the same. The argument addressed to me by Mr. Bristowe was this: That because this was a wrongful act, therefore a purchaser from them ought not to be held liable. If that were so, Parliament would have done the greatest injustice, because the wrongdoers themselves have actually ceased to exist by act of Parliament. Therefore, if the liability is not transferred to their transferees, the consequence is that there is a great wrong done, for which a suit can be maintained, but for which nobody is liable. To say that would be to say that Parliament has done an act of the grossest injustice by transferring the benefits to the defendants and not the liabilities.

Upon the whole of the case, therefore, I have come to the conclusion, first, that the coal under these lands was originally part of the demise by the lease of 1846 to the plaintiffs, the owners of the Newton Cap colliery; that it was erroneously placed on the map of the Hunwick colliery, as being within the boundaries of the Hunwick colliery; that it was set right in 1862 by Mr. Johnson in the manner he described in his

evidence; and, with the knowledge of all parties, it was then ascertained to belong to the Newton Cap colliery, and the West Hartlepool company ought from that time to have been most anxious not to touch any of the coal of these lands. In defiance of that, it is proved to my satisfaction that although it was done inadvertently, in 1863 this very land which they had acknowledged in 1862 to be part of the Newton Cap colliery was entered upon, the bounds broken, and the coal worked out from it, for which, in my opinion, the West Hartlepool company became liable, and if they were here now I should not have a shadow of a doubt on the subject. It is also proved that the fact of the coal having been so worked and the boundaries broken was unknown to the plaintiffs until 1870, and that there was no want of diligence on their part in not discovering it at an earlier period. I am of opinion that the statute begins to run on this subject from the time of the discovery, which was in 1870, and the bill was filed in 1872. Therefore, in my opinion, all the defenses that have been set up entirely fail, and the plaintiffs have established their right to a decree in substance such as they ask, which is an account of the coal which has been improperly worked, and for the damages occasioned by breaking the barriers between the two collieries. Upon this subject, although much evidence was attempted to be given, and many observations made by Mr. Bristowe in his very able comments on the case, I have come to the conclusion that he has entirely failed to establish that there would be no danger to the Newton Cap colliery from the breaking of those bounds, because I am satisfied that it is proved that the coal in the Newton Cap colliery will last many years after the Hunwick colliery is worked out and abandoned and left to nature. Therefore there will be very great danger of the water getting into the Newton Cap colliery. It is not necessary for me to decide that question, the parties having agreed that if I should decide there is a case against the defendants for an account of damages, instead of sending it to my chambers to be inquired into, it shall be referred to some skilled person or persons to ascertain what damages have been sustained by the working of the coal and the breaking of the bounds.

I will only add this: I suppose I am right in saying that the

real plaintiffs are not the Ecclesiastical Commissioners, but their lessees, and that it may be a matter of some importance to them; but the Ecclesiastical Commissioners themselves are, I suppose, the greatest land owners in the country, and it would not be of much importance to them whether they have any damages or not; and I can not help thinking they would act very reasonably if they would make a settlement of the matter without going any further.

GLASSE:—Your Lordship will not make any distinction between the plaintiffs on the face of the decree.

MALINS, V. C.:—No; I can not. The Ecclesiastical Commissioners sue in respect of the injury to the reversion, and the other plaintiffs in respect of the injury to the collieries.

GLASSE:—I ask that the decree may be in the same form as in the *Llynvi Company v. Brogden*, Law Rep., 11 Eq. 188.

WILLIAMSON asked that the decree should be taken as in *Hilton v. Woods*, Law Rep., 4 Eq. 432, where, in assessing compensation for coal already gotten by the defendant, the court being of opinion that he had worked it inadvertently, and not fraudulently, held that he was to pay only the fair value of such coal as if he had purchased the mine from the plaintiffs.

GLASSE:—I can not consent to any other decree than such as was made in the *Llynvi Company v. Brogden*.

MALINS, V. C.:—I was in hopes that the plaintiffs would have consented to a decree as in *Hilton v. Woods*, but as they will not, it must be according to the *Llynvi Company v. Brogden*; therefore there must be an account of all coals and other materials worked by the West Hartlepool company from the Newton Cap colliery and the mines therein comprised, and the value of such coal at the pit's mouth, making to the defendants all just allowances for the costs and expenses incurred by them in bringing such coal to the pit's mouth, but not including the cost of getting or severing the coal. Then there must be an account of the damages sustained by the plaintiffs by reason of the defendants having broken through the boundary between their mine and the plaintiffs' mine, and the defendants must pay the costs of the suit up to and including the hearing, and the subsequent costs will be reserved. I understand that the parties are willing that the reference should be to some skilled

person instead of to the chief clerk. That can be arranged out of court. In form the reference will be to chambers, but in substance I shall direct that the account shall be taken by some skilled person, and if the parties can not agree on a name I shall select some person, as I have the power of doing.

1. Release of one joint trespasser discharges all. *Gilpatrick v. Hunter*, 24 Me. 18; 41 Am. Dec. 370. The same of a joint obligor: *Heckman v. Manning*, 4 Colo. 543.

2. A release must be based upon a consideration but need not be under seal: *Heckman v. Manning*, 4 Colo. 543.

3. Release of damages to Phosphate Co. for alleged nuisance held to bar injunction to abate the same: *Kennerty v. Etiwan Phosphate Co.*, 17 S. C. 411; 43 Am. R. 607.

GONU V. RUSSELL.

(3 Montana, 358. Supreme Court, 1879.)

¹ **Location described.** Location consists of a number of distinct acts; all must be performed before a legal location exists.

² **Re-entry of original owner before the re-locator perfects his re-location.**

If A has failed to do his annual labor, and B thereupon enters to re-locate and proceeds so far as to put a notice on a stake at the discovery, but before he has marked the boundaries and otherwise completed the re-location A re-enters and resumes labor in *good faith*, A saves his location and renders null the prior acts of the re-locator.

³ **The fixing of a location stake** does not perfect a location; the marking of the boundaries is essential.

Appeal from Third District, Lewis and Clarke County.

The action was tried before WADE, C. J.

CHUMASERO & CHADWICK, for appellant.

E. W. & J. K. TOOLE, for respondent.

BLAKE, J.

The complaint alleges that the appellant was the owner and possessor of the Empire Quartz lode, September 17, 1877, and that the respondent entered thereon, September 17, 1877, and withholds the possession from the appellant. The prayer is for the recovery of the possession and damages for the unlawful detention. The answer denies the allegation of ownership and possession and contains a cross-complaint, which avers that the respondent before the location of the Empire lode was the owner and possessor of the J. H. Russell lode; that he re-commenced work upon this property July 17, 1877, and that the appellant has entered on the premises and is removing the quartz therefrom. The answer prays for a decree of title to the premises in the respondent, and an injunction restraining

¹ *Garfield Co. v. Hammer*, 8 Pac. 153.

² *Belk v. Meagher*, 1 M. R. 510; *Belcher Co. v. Deferrari*, 62 Cal. 160; *Lakin v. Sierra Butte Co.*, 25 Fed. 337; *Russell v. Brosseau*, 65 Cal. 605.

³ *Holland v. Mount Auburn Co.*, 9 M. R. 497; *Geleick v. Moriarty*, 9 M. R. 498; *Gleeson v. Martin White Co.*, 9 M. R. 429; *Newbill v. Thurston*, 65 Cal. 419.

the appellant from working thereon. The replication of the appellant alleges that the J. H. Russell lode is embraced within the boundaries of the Empire lode, and that the appellant entered into the possession of the same, July 3, 1877.

There does not appear to be any controversy respecting the facts. The appellant complains of errors in law which occurred in the instructions given by the court to the jury. The J. H. Russell lode was located by the respondent and other parties prior to May 10, 1872. By location and purchase, the respondent became the owner thereof, and the record title thereto was in his name a number of years before July 21, 1877. The respondent performed work thereon eighteen days between December 7, 1875, and December 17, 1875, and did no other work afterward until July 19, 1877. The appellant re-located July 3, 1877, the J. H. Russell lode, under the name of the Empire lode, by posting a notice on a stake at the discovery shaft of the J. H. Russell lode. The notice was regular in its description of the boundaries and the stakes at the corners of the Empire lode, and was recorded July 20, 1877, in the proper office. The respondent entered upon the premises and commenced to work July 19, 1877, and about one hour afterward the appellant run the lines of the Empire lode and cut and placed thereon stakes at its four corners.

The appellant maintains that the respondent failed to perform the labor and make the improvements required by the laws of the United States, and that the property in controversy was subject to re-location July 3, 1877; that several acts are necessary to complete the location of the quartz lode; that the performance of one act by the appellant conferred the right to do the other acts within twenty days; and that the respondent had no right to resume work on the J. H. Russell lode after the appellant had taken possession, July 3, 1877.

The statutes of the United States, which are applicable to these questions, provide that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," and that upon a failure to perform labor or make improvements, which are specified, "the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made,

provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location." The miners of the mining district in which the lode in dispute is situated did not make regulations "governing the location, manner of recording, amount of work necessary to hold possession" of the same: U. S. Rev. Sts., § 2324.

The legislative assembly of the Territory requires the discoverer of a mining claim to make a record thereof in the office of the county recorder of the county in which the same is situated, within twenty days after its discovery: Sts., 9th Sess. 127, § 1.

There must be a substantial compliance with these statutes. The appellant did not mark on the ground his location of the Empire lode, before the resumption of work by the respondent, and its boundaries could not be traced readily, or otherwise. The law of Congress, *supra*, which governs this matter, is the embodiment of one of the most ancient customs that has prevailed among miners. The Supreme Court of the United States, in *U. S. v. Castillero*, 2 Black, 17, one of the most important cases ever heard by this tribunal, reviews the ordinances of Spain and Mexico prescribing the mode of acquiring title to mines, and holds that a strict compliance with their terms and conditions is essential. In a learned opinion, Mr. Justice Clifford says: "Boundaries also must be fixed to carry the adjudication into effect, or rather to complete it, else the title or claim, like other indefinite and uncertain interests in lands, will be void for uncertainty. Marking of boundaries also is essential under all circumstances, whether the mine is situated in public or private lands; compliance with the requirement is essential to show what extent of the public domain has been segregated from the mass of such lands and has passed into private ownership. * * * Public convenience, therefore, in such a case, requires that the boundaries should be fixed, and besides, unless the limits of the pertenencia were fixed and staked, or monuments set, other tribunals, whose duty it is to adjudicate lands to applicants for agricultural purposes, would be subjected to embarrassment and be led into error." This decision was rendered in 1862 and formed the basis of some of the sections relating to mineral lands which

were afterward enacted by Congress. The necessity of the marking of boundaries has been recognized in the courts of the mining States: *Hess v. Winder*, 30 Cal. 349; *Golden F. Co. v. Cable Co.*, 12 Nev. 312. In the last case the court observes: "There is no way of locating a quartz vein except by marking out surface lines."

The respondent failed to comply with the statutes, *supra*, and did not perform the work on the J. H. Russell lode, which is therein required, but he had the right to defeat the forfeiture of his interest in the property by resuming labor thereon before a location thereof had been made by another. Did the act of the appellant in placing the notice on the stake at the discovery shaft constitute a location according to law? This is the sole question for our determination. The notice did not designate the boundaries, because it defined them by monuments which were not upon the ground. The appellant did not mark his location of the Empire lode on the ground until the respondent resumed work thereon. The law contemplates that the location of a mining claim shall consist of a number of distinct acts, which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists. The owner of the lode which has become subject to re-location can resume work thereon at any time prior to the performance of all these acts. The appellant could not make a valid location of the Empire lode until he had marked the boundaries so that they could be traced readily by means of stakes, monuments, natural objects, or any other certain means. The resumption of labor in good faith by the respondent, before the appellant perfected his location, rendered null the prior acts of the appellant.

The instructions of the court state the foregoing propositions and are correct.

Judgment affirmed.

1. Effect of re-location before abandonment: *Slavonian Co. v. Perasich*, 1 M. R. 541; *Belk v. Mengher*, 1 M. R. 510, 522.
2. Re-location by co-tenants, excluding other co-tenants: *Strang v. Ryan*, 1 M. R. 48.
3. Claims once forfeited become open to re-location: *King v. Edwards*, 4 M. R. 480.

4. A defective title may be perfected by re-location: *Meyendorf v. Frohner*, 5 M. R. 559.
5. Re-location no waiver of previous rights: *Weill v. Lucerne Co.*, 3 M. R. 372.
6. Outfitter entitled to share in old claim re-located by his prospector: *Murley v. Ennis*, 12 M. R. 360.
7. A co-owner who has worked for years under a common claim of title is estopped from re-locating for his sole use: *Sever v. Gregorich*, 16 Nev. 325.
8. Effect of filing additional location certificate; such record allowed in evidence although filed after suit begun: *Strepey v. Stark*, 7 Colo. 614.
9. An amendment to a location certificate made before adverse rights attach, relates back to the original location: *McGinnis v. Egbert*, 8 Col. 41; and will so relate to the extent of cutting off an intervening location. *McEroy v. Hyman*, 25 Fed. 596.
10. Location, with a promise to represent, does not save a claim from forfeiture or prevent a re-location: *Saunders v. Mackey*, 6 Pac. 361.
11. A first record is usually defective, and it is the policy of the law to allow an amendment to be filed: *McEroy v. Hyman*, 25 Fed. 596.

GREEN V. SPARROW.

(3 Swanston, 408. High Court of Chancery, 1725.)

A covenant to mine without delay which is broken *by a fraudulent delay*, allows of the interposition of a court of chancery.

¹ **Fraud, to reduce conditional rent.** Where the lessee of a colliery under covenant to pay a rent commencing the first quarter day after he had digged 1,000 stacks of coal, and to dig such coal without delay, etc., commenced work and dug that amount "wanting only a small quantity," and then employed his workmen in other works until the approaching quarter day had elapsed, with the expressed intent of saving the rent of one quarter: *Held*, that such fraudulent contrivance should not defeat the running of the rent from the first quarter day thus elapsed.

The plaintiff, in the year 1721, leased to the defendant some coal mines, reserving a rent of £600 per annum, the first quarter's rent to be paid at the next feast after the lessee should have digged 1,000 stacks of coal; the lessee covenanted that he would dig or cause to be digged the said 1,000 stacks of coal without delay and in a reasonable time; and it was further covenanted between the parties that the defendant might, upon six months' notice, determine and quit the said lease, paying all the rents due and performing all the covenants contained in the lease. The lessee entered, and in 1723 gave six months' notice, according to the agreement, whereby he insisted that the lease was determined at Christmas, 1723. The plaintiff preferred his bill, and set forth that the defendant, after entering into the lands at Christmas, 1721, wrought in the mines; and having digged the 1,000 stacks of coal about a week before quarter day, wanting only a small quantity, employed his workmen in other works, telling some of them that he was not such a fool as to pay a quarter's rent for a few days' work; by which means the 1,000 stacks of coal were not digged till after Lady-day, whereas they might have been digged before had not the defendant himself prevented it, and insisted that the first quarter's rent therefor ought to have been paid upon Lady-day, 1721; and prayed that the defendant might be obliged specifically to perform his covenants and continue the lease for the twenty-one years; for not having performed his covenants he insisted he could

¹ *Wood v. Londonderry*, 6 M.R. 464; *Peters v. Phillips*, 19 N.W. Rep. 662.

not determine it; for that the power to determine by notice was conditional, viz : on paying the rent and performing the covenants, by one of which he was obliged to dig the pits in a workmanlike manner, and to level the pits with the gin-pit, (viz.: the pit where the engine is to carry away the water,) which he had not done, whereby the pits were overflowed with water, and become of no service to the plaintiff.

It was said for the plaintiff that the plaintiff's application was very proper in this court, for the defendant had made use of fraud and contrivance to prevent the commencement of the rent, and that he was entitled to insist on a specific performance of the defendant's covenant, and the continuance of the lease; for though there might be an action of law for breach of covenants if he had not performed them, yet it is more just and reasonable in a court of equity to oblige the defendant specifically to perform his covenants than to drive the plaintiff to an action of law to recover damages only for the breach of them.

For the defendant it was said that the bill ought to be dismissed because the plaintiff, if injured, might have his remedy at law; for if the defendant had prevented the digging of 1,000 stacks of coal by design, an action of covenant would lie against him at common law, since he covenanted that he would dig them without delay, etc. And as to the second point, if he had not performed his covenants he can not determine the lease; and then it still continues without the assistance of this court; if he has reformed them he may determine it; and this is a proper fact for a jury to decide, and not for this court.

KING, Lord Chancellor, agreed that, as to the second point, it is proper to be tried at law and in an action of debt; for if the defendant has not performed his covenants he can not then determine the lease, and if that is still subsisting which is a fact for a jury to try, an action lies for the rent. But as to the first point, though he might indeed have remedy by an action of covenant upon the collateral covenant to dig the coal without delay, etc., yet there was fraud in preventing the digging before the quarter day in order that the rent might not commence so soon; and this fraud requires the interposition of the court. Decree, therefore, the defendant must pay

the first quarter's rent due at Lady-day, 1721, and account and pay the rent to Christmas, 1723, till which time he allows the lease continued, and the plaintiff to have the costs against the defendant so far as he has prevailed; and as to the other point, whether the lease is determined or no, it is properly cognizable at common law, and the bill must be dismissed as to that, and the defendant, as to that matter, so far must have his costs. MSS.

The following is the entry in the register relative to the question noticed in the preceding report:

"Upon debate, etc., his lordship declared that the said George Sparrow fraudulently delayed the getting the 1,000 stacks of coal till after the quarter day on purpose to keep off the commencement of the rent; and doth therefore think fit to order and decree that the defendant Sparrow do pay to the plaintiff Greene the first quarter's rent for the said colliery works as due at Lady-day, 1721, and do continue to pay rent for the same from Lady-day, 1721, to Christmas, 1723," etc.

BISHOP V. GOODWIN ET AL.

(14 Meeson & Welsby, 260. Court of Exchequer, 1845.)

¹ **Construction of lease on royalties payable quarterly.** Lessees were under covenant to pay a certain royalty quarterly; and if the royalty fell short they were to make it good up to a certain sum at the end of each quarter so that it should amount to at least £150 annually. *Held*, that an excess of royalty paid on the first quarters could not be made to offset a deficit in the succeeding quarters.

This was an action of debt for the recovery of rent due under a mining lease, which came on for trial before Pollock, C. B., at the Spring Assizes for Staffordshire, 1844, when it was referred, by order of Nisi Prius, to the decision of an arbitrator, who was empowered to raise any questions of law on the face of his award. The indenture of lease was dated the 24th of June, 1835, and thereby the defendants became

¹ *Wolfing v. Ralston*, 61 Cal. 288.

lessees of the plaintiff of certain coal mines in the county of Stafford, for a term of twenty-one years. The lease contained the following covenant: That the said defendants should and would deliver quarterly, to the plaintiff, two equal thirteenth parts of all coal which should be raised or got out of the said mines demised during the said term, or should pay to him quarterly the value thereof in money. It also contained a provision that in case at the end of the first quarter of any one year of the said term such quarterly deliveries should not have equaled in value, or such quarterly payments in money should not have equaled in amount, the sum of £38 10s., then the lessees should also pay, at the end of every such first quarter, such additional rent or sum of money as would make up the sum of £38 10s.; and in case, at the end of the second quarter, such deliveries or payments for that and the preceding quarter should not have equaled in amount or value the sum of £75, then the lessees should also pay, at the end of every such second quarter, such further sum as would make up the said sum of £75; and in case, at the end of the third quarter, such deliveries or payments for that and the two preceding quarters should not have equaled in amount or value the sum of £111 10s., then the lessee should pay, at the end of such third quarter, such further sum as would make up the sum of £111 10s.; and in case, on the 24th day of June, in any year, the deliveries and payments for that and the three preceding quarters should not have equaled in amount or value the sum of £150, then the lessee should pay, on the said 24th day of June, such additional rent or sum as would make up the sum of £150; it being the intent and meaning of the parties to the said lease, that the royalties thereby reserved should always amount to the sum of £150 per annum at the least.

The arbitrator found by his award that there was raised from the mines demised, between the 12th of January, 1837, and the 25th of March, 1844, a quantity of coal of which the value of two equal thirteenth parts, after certain deductions, amounted to the sum of £1,061 5s., which sum had become due from the defendants to the plaintiff; and that during the same period there became due from the defendants to the plaintiff the further sum of £179 18s. 4d., being the aggregate of the sums necessary to make up the said minimum rent of £150

due under the lease. But the arbitrator did not, in calculating the said sum of £179 18s. 4d., set off the excess in value of the royalty accruing in any one quarter of a year against the deficiency in any previous quarter.

The award then stated, that if the court should be of opinion that the minimum rent of £150 was an annual minimum, and that, in calculating the amount due to the plaintiff at the end of each year, the excess of royalty accruing in one quarter was to be set against the deficiency in a previous quarter, so that at the end of each year the plaintiff would be entitled to no more than £150, unless the value of two thirteenths, minus the deduction during that year, amounted to a greater sum—in which case it was admitted that he would be entitled to that sum—the verdict for the plaintiff was to stand, but the damages were to be reduced by the sum of £64 15s.

On a former day in this term, accordingly, J. W. Smith obtained a rule, calling upon the plaintiff to show cause why the damages should not be reduced by the sum of £64 15s.; contending that such was the true construction of the lease; against which.

WHATLEY (WHITMORE with him) now showed cause.—There is no foundation for this rule; for it is clear that the true construction of this lease is, that this is a *quarterly* not a *yearly* reservation of the rent. The amount is to be settled in each quarter, and no two quarters can be blended together, so as to make up the deficiency in one by the excess in another. It was the obvious intention of the parties that the royalty should always amount to £38 10s. per quarter at the least. There is not a word to show that any excess on any quarter is to be repaid. If the royalty in any quarter falls short of that sum the difference is to be made up, and if in any quarter it exceeds that sum, the actual amount must be paid to the plaintiff. Even if no coal is raised in the first quarter the defendants are to pay £38 10s. for that quarter. (POLLOCK, C. B.—You say that in calculating the rent from quarter to quarter you carry on a surplus, but not a deficiency?) Yes. The court then called on

J. W. SMITH, in support of the rule.—The argument on the part of the defendants rests on the concluding words of the

clause, "that the royalties thereby reserved should always amount to the sum of £150 *per annum* at the least." Are they not to have the benefit of a great excess in the fourth quarter, supposing them to have raised no mineral in the other three quarters? (ALDERSON, B.—Then they should have said that the plaintiff should not be paid *more than* £150, *unless* in each quarter the deliveries or payments should not have equaled in amount or value the sum of £38 10s. It is quite clear that in each quarter that amount is to be made up and the money paid.) The intention to secure to him £150 per annum at the least would be carried out by returning the £111 10s. already paid, if there were an excess to the same amount in the last quarter. (POLLOCK, C. B.—It is for one purpose a quarterly rent, but the quarters are blended together for the purpose of taking care that at the end of the second quarter there shall be £75, of the third, £111 10s., and of the fourth, £150. ALDERSON, B.—There is nothing to show that money once paid is ever to be restored.) Three of the quarters might be spent in an outlay in preparing the mine for working, or clearing it of water. Surely it is just that the lessees should be reimbursed out of the excess in the fourth quarter, if the £150 be equally secured.

POLLOCK, C. B.—The true construction of the lease is clearly this: That if the royalty in any quarter falls short of £38 10s. it must be made up to that sum; but if the royalty in any quarter exceeds that sum, there is nothing in the lease to show that the surplus is to be given back to the lessees. A balance is to be carried forward in favor of the landlord, but not against him.

ALDERSON, B.—Mr. Smith's argument really comes to this: That there is more injustice in settling the account in successive quarters than in successive years; for it is admitted that there is not to be any recouping in any subsequent year. If he is right, I do not see how we could stop short of retracing the account after the lapse of twenty years. As the covenant stands, it is clear that the rent is to be made up every quarter, and the landlord is not to have less than £150 in the

year, although he may obtain a larger sum, compounded of the rent and royalty.¹

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

AUDENRIED ET AL. V. WOODWARD.

(28 New Jersey Law, 265. Supreme Court, 1860.)

Motion to stay proceedings on execution. Defendant moved to stay proceedings on execution upon a judgment by confession entered on a bond, and warrant of attorney given for money loaned, and also asked for the award of a feigned issue to try the question whether the debt, which was the consideration of the bond, had been paid, the defendant claiming that subsequent to the giving of the bond, the plaintiffs had become indebted to him upon a coal contract and lease in a sum sufficient to discharge the debt secured by the bond; but it appearing to the court from the testimony taken in pursuance of the motion, that there was a balance due from defendant to plaintiffs independent of the debt secured by the bond, and that no part of the debt so secured had been paid, the motion was denied.

Royalty must be in marketable condition—Duty of tenant to provide a coal breaker. Where a tenant rents a coal mine, and is to pay the lessor the rent in coal at specified prices, in the absence of any special agreement as to the condition in which the coal is to be delivered, it is the usage for the tenant to provide the coal breaker, and his duty to deliver it in a marketable condition; and if not so delivered, the expense necessarily incurred by the landlord in preparing it for market may be charged by him to the tenant.

OGDEN, J., delivered the opinion of the court.

¹ In the case of *Warner v. Caulk*, 3 Wharton, 193, it was held, that the right of the tenant to a deduction from his rent, in consequence of the failure of the landlord to make repairs and alterations on the premises, was limited to the injury thereby produced during the quarter for which the rent was demanded, and could not be extended to the whole amount of injury sustained throughout the year, although the rent was reserved as a certain yearly sum, payable quarterly; and it was said, as in the principal case, that if the tenant could be allowed to throw the diminution of value for several quarters into one, he must be entitled to do the same thing for several years.

On the 12th of July, 1858, a judgment by confession was entered in this court in favor of these plaintiffs against the defendant for the sum of \$1,800 debt, and for costs, it being the penalty of a bond dated April 3, 1858, conditioned for the payment of \$900, with interest, by the defendant to the plaintiffs or their assigns on the 10th day of the same month. A rule was granted at the last February term (on an application in behalf of the defendant), for the plaintiffs to show cause why the judgment should not be set aside, or the proceedings on the execution be stayed, and a feigned issue awarded to try whether the debt, which was the consideration of the bond, had not been fully paid. The argument of the rule was had at the term of June before a single justice of this court. It was not contended that there was fraud in procuring the bond and warrant of attorney, or that there was any failure of the consideration. The counsel of the defendant admitted that a loan of \$900 was made by the plaintiffs to the defendant, on the 3d of April, 1858, and that it was to have been repaid prior to the day when the judgment was entered, and that the loan was a distinct transaction from any other business relations of the parties; but he insisted that, in the course of a business which subsequently was done between them, the plaintiffs had become indebted to the defendant in an amount which was much more than sufficient to pay off and discharge the *loan debt* secured by the said bond and warrant of attorney, and that the judgment should be ordered by the court to be canceled of record. It appears, in the testimony taken and upon the exhibits marked since the rule to show cause was granted, that on the 28th of April, 1858, and also at later dates, the plaintiffs, who then owned a large coal mine or coal field, near Wilkesbarre, in Pennsylvania, and had leased out the right to dig coal therefrom for a term of years, agreed with the defendant, who was an assignee of the lease, to purchase from him all the coal of particular descriptions which he could deliver at Whitehaven, during that boating season, at prices fixed from time to time for the different sizes and qualities; and it was stipulated that they should retain in their hands an appropriate portion of the purchase money sufficient to compensate for the rent of the mine, which rent was based upon

the quantity taken out, also to pay to the employes of the defendant the costs of mining and of forwarding the coal to Whitehaven, and of delivering it into boats there.

Invoices were sent to the plaintiffs weekly, by the agent of the defendant connected with the works, showing the quantity and quality of coal thus forwarded; and the accounts of the prices made out from those invoices, and of the charges and deductions which were to be made, were kept by the plaintiffs at their office in New York.

They had an office and place of business in the city of New York, and one likewise in Philadelphia. An account current, running from the commencement of the delivery of coal to the end of December, 1858, made from the books of the office in New York, has been marked an exhibit in the cause, from which it appears that the prices for all the coal delivered by the defendant into boats at Whitehaven during the season, amounted to \$24,956.04, and that the charges made against him amount to \$24,624.38, independent of the judgment debt, leaving a balance of \$331.66 due to the defendant on that account. An account current to the same date, made from materials in the office in Philadelphia, also was exhibited, from which it appears that, for matters not entered upon the books of the office in New York, and including the loan of \$900 made on the 3d of April, there would be a balance due to the plaintiffs of \$2,088.82. By deducting from this sum the balance of \$331.66, appearing to be in favor of the defendant in the New York account, the two accounts show a net balance of \$1,757.16 to be due, at that date, from the defendant to the plaintiffs. If this result be correct, the defendant certainly can take nothing by his motion. It was insisted, in argument, that the charges which properly should have been made against the defendant in the New York office accounts do not exceed the sum of \$22,611.42, which fact, if supported, will increase his balance there, from \$331.66 to \$2,344.58, and will overcome the balance of \$2,088.82, appearing in the Philadelphia account to be due to the plaintiffs.

There is a charge in the New York account made on the 27th of July, of \$400, and one made on the 23d of August, of \$600, which are disputed by the defendant because they appear as payments by the plaintiffs to James H. Stanton & Co.

It is proved by the testimony of John Stanton, that Woodward purchased the lease and the right to work the coal field from James H. Stanton & Co., in January, 1858, and gave his three promissory notes on time in payment thereof, amounting together to \$1,000, and that subsequently, in the presence of the witness, he requested the plaintiffs to take those notes up for him, and to reimburse themselves from the first profits on the coal. The plaintiffs retired those notes by their acceptances of Stanton & Co.'s drafts of four and of six hundred dollars at thirty days, which acceptances were paid by them at maturity. The objection against the propriety of charging the amounts of those notes in the coal accounts can not prevail.

A charge of \$187.70 of cash, paid for a patent coal breaker, was also said to be incorrect, and likewise a charge of \$307.19 for cash advanced. It satisfactorily appears from the proofs that it was the business of the tenant of a colliery, and not of the landlord, to provide a breaker for preparing the coal for market; and as the defendant could not obtain one on his own responsibility but requested aid from the plaintiffs, all the payments which they made, both in New York and in Philadelphia, for the construction of that machine and for the expenses of furnishing it to the defendant, are proper items of charges in the accounts. It was proved by Mr. W. G. Audenried, one of the plaintiffs, that the charge of \$307.19 is for money paid by them for the accommodation of the defendant upon his draft on them at sight. Objections were made to other items of charge in the New York accounts, amounting to \$500, which objections were met by the testimony; but it is not necessary for me here to refer to them and to the details of the proofs for the proper determination of this application.

The three sums which have been noticed are sufficient for my purpose—they amount to \$1,494.89. By deducting this sum from the balance of \$2,344.58, assumed by the counsel to be due to the defendant on the New York account, that balance is reduced to about \$850 in favor of the defendant. He, likewise, has denied the correctness of several of the charges made against him in the Philadelphia account, to wit, \$100 of the date of 20th of March, 1858; \$399.40 of the 17th of May; \$158.75 of about the same date; \$158.58 on account of

the coal breaker; \$189.09 for rent on coal gotten out by the defendant from the mine, but not shipped to the plaintiffs, and several other items amounting to over \$200. The testimony shows that the item of \$100 was money lent to the defendant by a check of the plaintiffs, which bears his indorsement; also, that the item of \$158.75 was for money advanced by the plaintiffs, at the request of the defendant, in returning for him, after protest, his draft made upon and accepted by one Harding, but dishonored at maturity, and that the item of \$158.58 was cash paid on account of the coal breaker. This subject of charge was settled in favor of the plaintiffs in my examination of the New York account. The charge of \$399.40 is for the face of a note and the protest, dated the 14th of December, 1857, payable in five months, at a bank in Philadelphia, signed by Wm. H. Woodward & Co., a signature sometimes used by him in his business, in favor of John E. Woodward, indorsed by him to James H. Stanton & Co., and by them, before maturity, indorsed to the plaintiffs.

The *bona fides* of the note has not been questioned; and although there was no proof that the defendant requested the plaintiffs to discount the note for Stanton & Co., I can see no reason, in the nature of their business relation, why the amount of it should not have been charged in the account between the plaintiffs and the defendant after the defendant had failed to pay it at maturity. The sum of \$189.09 for rent on coal, gotten out by the defendant, and disposed of by him at Whitehaven and elsewhere, is made up from dates furnished to the clerk and book-keeper of the plaintiffs by the agent of the defendant, and was shown by the proofs to be a proper charge in accordance with the terms of their contracts.

Without meaning to say or to leave it to be inferred that I doubt the correctness of the other items in the plaintiff's accounts, I shall forbear going into a more critical examination on them, because I have shown that enough of them have been sufficiently established to support the conclusion which I have reached in this case.

The several charges in the Philadelphia account that have been looked into, and found to be correct, show a balance of indebtedness there from the defendant to the plaintiffs \$945.82, without including the loan of \$900, for which the

judgment in question was confessed. By deducting from this the sum of \$850, the balance which, for the purposes of this application, I have assumed to place to the credit of the defendant on the New York account, a balance of nearly \$100 will stand against the defendant.

This result shows that no part of the debt which was originally represented by the bond and warrant of attorney, but now in judgment, has been paid, and that no ground has been laid which can justify the court in awarding a feigned issue. The motion is denied with costs, and the rule staying proceedings on the execution, which was granted in March last, should be discharged.

BARRS V. LEA.

(33 L. J. Ch. 437. Before the Vice-Chancellor, 1864.)

¹ Lease—"Consideration money" treated as rent. In a mining lease, besides an annual surface rent, certain sums payable half yearly, described as "further consideration money," and depending upon the rate of working the mines, were reserved to the lessor, his heirs and assigns. Held, on the death of the lessor intestate, that these sums were not purchase money passing to the personal representative of the lessor, but in the nature of rent, and therefore passed to the heir as incident to the reversion.

This was a special case.

By an indenture of lease dated the 20th of February, 1857, and made between John Joseph Hill of the one part and William Henry Dawes of the other part, in consideration of £250 to Hill paid by Dawes, certain lands and mines were demised to Dawes for thirty years, he paying to Hill, his heirs or assigns, the annual sum of £40 as surface rent, and also "yielding and paying yearly, and every year during the first ten years of the said term of thirty years thereby granted, over and above the said yearly rent thereinbefore reserved unto the said J. Hill, his heirs and assigns, the further consideration money or sum of £500, by two equal half-yearly payments,

¹ *Wightwick v. Lord*, 6 H. L. Ca. 217; *Cowley v. Wellesley*, 35 Beav. 653.

clear from all deductions, in respect of present or future taxes or other payments, except property tax." And it was thereby agreed that if it should happen in any one or more year or years, during the first ten years of the said term of thirty years, that Dawes, his executors, administrators or assigns, should work, get or obtain upward of one acre by admeasurement of the mines, veins and seams of coal and ironstone thereby demised, then that he, Dawes, his executors, administrators and assigns, should yield and pay unto Hill, his heirs or assigns, a further sum of £50 for every additional acre of mine so worked, gotten and raised, and in like proportions for every fractional portion of an acre so worked, gotten and raised as aforesaid, at the expiration of the year or years of the said term in which such excess should arise; but it was also provided that, under the provisions of this clause, Dawes, his executors, administrators or assigns, should not, in any one year of the said term, be required to pay a portion or larger sum than the sum of £1,000; and it was provided that when and so soon as Dawes, his executors, administrators or assigns, by payment of the yearly consideration money of £500, with the excess of consideration money to which he or they might become liable should have rendered and paid unto Hill, his heirs or assigns, the full consideration money or sum of £5,000, then the said yearly consideration money or sum of £500 should cease and determine, although at that period the first ten years of the said term of thirty years thereby granted, might not have expired, anything thereinbefore to the contrary thereof notwithstanding; all and every other, the rents, reservations, payments, covenants, agreements, considerations, provisos, limitations and restrictions hereby reserved and contained nevertheless, to remain in full force and virtue, as if such payments of the said sum of £5,000 had not been made.

The lease contained no power of distress, but it contained a provision that if the "yearly or other rents, renders and payments," or any part thereof, should be unpaid for forty days after demand being made for payment thereof, and no sufficient distress could be found or legally taken upon the premises, it should be lawful for Hill, his heirs or assigns, to re-enter; and it was also provided, that if the said mines should be worked out after the expiration of the first ten years of the term, it should be lawful for Dawes to determine the lease.

J. Hill died intestate in July, 1861, and a question arose as to whether the "further consideration money of £500 yearly" was to be treated as rent or purchase money.

Mr. AMPHLET and Mr. PECK, for the heir-at-law, contended that all sums that might accrue due in respect of this "further consideration money" ought to be considered as rent. Clear evidence must be found on the face of the deed to constitute the heir at law a trustee for the next of kin: *Hutherton v. Bradburne*, 13 Sim. 599.

Mr. ROLT and Mr. FREELING, for the next of kin, submitted that this was a question of intention. If this was a sale out and out of minerals, although payment was reserved to the heir, yet, unless the intention was apparent, the heir would be only a trustee for the personal representatives; the minerals when severed from the soil, became but a chattel. It made no difference that this money was to be paid by annual installments: *Foley v. Fletcher*, 3 Hurl. & N. 769. The circumstance of there being no power of distress in the lease could be no indication of intention either way.

Wood, V. C., said, that from the whole scope of the lease he thought that this was not a sale of the minerals. Hill might have reserved these payments to his next of kin, or he might have reserved them to his heir, and declared his heir a trustee. But he had not done so; he had simply reserved these payments to him, his heirs and assigns, and in the absence of strong evidence of intention apparent on the face of the instrument (which his honor could not find here), the court would not declare the heir a trustee. He must, therefore, declare that these annual payments were payments in the nature of rent.

¹ BROOK V. BADLEY.

(L. R. 4 Eq. 106. The Rolls Court, 1867.)

A legacy charged on land is an interest in land within the Statute of Mortmain, and can not, while it remains unpaid, be bequeathed for charitable uses by the legatee.

Installment payments for minerals treated as rent. A testatrix demised the minerals under certain lands in consideration of a surface rent, and of a sum of £5.039 1s. 3d., to be paid by half-yearly installments, at the rate of £750 per acre for such part of the minerals as should be gotten by the lessees, until the whole sum was completely paid, with powers of distress and re-entry in default of payment. At the death of the testatrix one installment was due and unpaid. *Held*, that it was in the nature of rent, and passed under a residuary bequest in favor of charities.

This was the further consideration of a suit for the administration of the estate of Caroline Elizabeth Pargeter, who died on the 26th of April, 1864, having by her will, dated the 8th of August, 1862, given all her personal property "applicable for the purposes of mortmain," to trustees upon trust for charitable purposes. The questions now raised were, whether certain parts of the testatrix' property were or were not pure personalty, and as such applicable for the charitable trusts. The present report relates only to two of the items in question, viz., a legacy of £3,000 under the will of Dr. Withering, purchased by the testatrix of the legatees; and a sum of £250, due to her at the time of her death under an indenture of lease of the 15th of June, 1859.

Dr. Withering's will was dated the 21st of August, 1830; by it he gave all his real estate to trustees upon trusts for the benefit of his wife during her life; and he bequeathed his personalty to the same trustees upon the same trusts. He then declared that it should be lawful for the trustees, at and after the decease of his wife, or (with the exception of a certain specified mansion house), at any time during her life, if at any time it should seem to them expedient, to sell all or any part of his said premises or otherwise available property; and he directed them to stand possessed of the proceeds upon trust thereout to pay his debts and funeral and testamentary ex-

¹ Affirmed, L. R., 3 Ch. App. 672.

penses, and all such pecuniary legacies as he might direct to be paid thereout or therefrom, and to place the remainder, with his other moneys and personal estate, out at interest, on such securities as therein mentioned; and then after reciting that under the will of Mrs. Lydia Richards he derived property which he estimated at £3,000, he directed that out of the money to be received from the sale of his aforesaid available property, his trustees should set apart the sum of £3,000; and, after the decease of his wife, he bequeathed £3,000, part thereof, to certain persons therein mentioned, and £3,000, the residue thereof, to a person from whom, as mentioned above, the testatrix in the cause purchased the same. The testator proceeded to bequeath a series of legacies to be paid out of his personal estate.

Dr. Withering died in June, 1832; his widow was still living; the legacy of £3,000 had never been raised or paid; and there was no evidence that any part of the realty had been sold.

Mr. SOUTHGATE, Q. C., and Mr. PECK, for the plaintiffs, the executors of the will.

Mr. JESSEL, Q. C., and Mr. F. C. J. MILLAR, for the defendant Badley, and Mr. SELWIN, Q. C., and Mr. SARGEANT, for other parties beneficially interested.

Mr. BAGALLAY Q. C., and Mr. T. S. OSLER, for the defendants.

By the indenture of the 15th of June, 1859, mentioned above, the testatrix, in consideration of a surface rent thereby reserved, and of a sum of £5,039 1s. 3d., to be paid by installments, demised certain lands of which she was seized in fee, and the mines and minerals thereunder, to the persons therein mentioned, for a term of ten years from the 25th of March, 1859; and the lessees thereby covenanted to pay the sum of £5,039 1s. 3d. by the following installments: £500 upon the execution of the indenture; £500 on the 29th of September, 1859; £500 on the 25th of March, 1860; and thereafter at the rate of £750 per acre, for and in respect of such part of the mines as should be gotten by the lessees after the

25th of March, 1860, until the remainder of the sum of £5,039 1s. 3d. should be fully paid and satisfied, such last mentioned sum of, or at the rate of £750 per acre, to be paid and discharged by equal half yearly payments, on the 25th of March and the 29th of September in each year; and in case default should be made in payment of the several sums and the surface rent thereby reserved and made payable, for the space of forty days after the several days and times thereinbefore appointed for payment thereof, the testatrix was to be at liberty to enter on the demised premises, and stop the workings, and distrain the minerals then gotten, and any live or dead stock thereon, and if no sufficient distress could be found, to re-enter thereon; and from the time of such re-entry the indenture was to be void, and the term thereby created to cease.

At the death of the testatrix, the whole of the sum of £5,039 1s. 3d. had been paid, with the exception of £250 which had become due on the 25th of March, 1864.

Mr. JESSEL, Q. C., contended, that the sum of £250 was in the nature of unpaid purchase money for which the testatrix had a lien on the demised land, and that she could not bequeath it to a charity: *Harrison v. Harrison*, 1 Russ. & My. 71.

Mr. BAGGALLAY, Q. C., *contra*, argued that the sum of £250 was in the nature of rent, for which the testatrix had the ordinary powers of distress and re-entry.

LORD ROMILLY, M. R., after stating Dr. Withering's will, and the facts relating to the legacy of £3,000, and remarking that it was clearly charged on his real estate, continued:

Mr. Baggallay very properly admitted that if the legacy of £3,000 had, by Dr. Withering's will, been given to a charity, he could not have maintained that it was valid; but he contends that when this legacy forms a part of the property of a legatee, it becomes pure personalty in the hands of that legatee, and may be bequeathed by that legatee to a charity, although, in fact, the legacy has never been raised, and is still a charge upon the land.

This question first came before the court in *Attorney General v. Harley*, 5 Madd. 321. (His Lordship read the marginal note and the judgment.) This is directly in point, and if not overruled must govern the case before me. It came

again, in a different way, before the court in *Shadbolt v. Thornton*, 17 Sim. 49. In that case the vice-chancellor considered that the conversion into pure personalty must be considered to have actually taken place at the time when the duty to do so arose; and if that be all that is decided by that case, it would not assist the construction in favor of the charities here, as the obligation or duty to sell the land and pay the legacy does not arise until the death of the testator's widow, which time has not arrived. The next case is *Marsh v. Attorney General*, 2 J. & H. 61. This goes one step further, for the period of sale had not then arrived; and it is, I think, impossible to reconcile *Marsh v. Attorney General* with *Attorney General v. Harley*.

Middleton v. Spicer, 1 Bro. C. C. 201 has, I think, no application to the present case; so also I think that *Myers v. Perigal*, 2 D. M. & G. 599, does not affect the present question. All that was decided in that case was with reference to a share in the partnership, where part of the partnership property consisted in land or interests in land.

In *Jeffries v. Alexander*, 8 H. L. C. 594, the House of Lords, reversing the decision of the Lords Justices, held that a covenant by a man with trustees to pay a sum of money to be applied by them in charity, where his pure personalty was insufficient to discharge the debt, was invalid as against the provisions of the Statute of Mortmain.

In this uncertain state of the authorities, I am of opinion that I must refer to the Statute of Mortmain itself, and consider the matter as if it were *res integra*, and not covered by any decision. The words of the 3d section of the statute, 9 Geo. 2, c. 36, are these: "All gifts, grants, conveyances, appointments, assurances, transfers and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the

said 24th day of June, 1736, be made in any other manner or form than by this act is directed and appointed, shall be absolutely and to all intents and purposes null and void."

I can not get over these words. I think it is impossible to say that this legacy of £3,000 charged on Dr. Withering's lands, is not an interest in land, or that, as Miss Pargeter could, had she been living on the death of Mrs. Withering, have required this amount to be raised by sale of part of the land, it is not an interest in land within the words of the statute. It is, I think, an injurious practice (which courts of justice occasionally indulge in), viz.: that of putting a forced construction on the words of a statute, which is not the plain and obvious meaning of them, in order to avoid the effect of an enactment which the court of justice at the time considers prejudicial to society. Not that I consider this act prejudicial to society; it has, in my opinion, frequently prevented the perpetration of gross injustice to near relations of the testator; nor am I able to discover the merit which some persons seem to attribute to a dying man who gives to a charity what he is no longer able to enjoy himself. I must therefore hold that this legacy did not pass, under the bequests in Miss Pargeter's will, to charities.

I do not think the other question is open to much doubt. I am of opinion that the sum of £250 was pure personalty; that it was rent in the proper sense of that term, and not unpaid purchase money. It is true it was rent for leave to work a mine, in doing which the soil is taken away; and in one sense it is purchase money for the minerals gotten; but I think that, in the proper meaning of the words, it is more analogous to rent, and that a rent of this description, or a royalty on minerals due at the death of a testator, is pure personalty, and not subject to the provisions of the statute; and I decide accordingly.

¹KILLE ET AL. V. EGE ET AL.

(82 Pennsylvania State, 102. Supreme Court, 1876.)

Date of commencement of action when new parties have been substituted. In an action for mesne profits none of the plaintiffs were originally parties to the action of ejectment, the record of which they gave in evidence, but were added two years after the writ issued. The original plaintiffs had no title and were nonsuited. The new plaintiffs did not derive title from the original plaintiffs, but recovered on their own. There was no privity of interest or title between them, and their names had not been omitted through mistake. *Held*, that although the plaintiffs had been added without objection, yet they thereby acquired no rights relating back of their admission, and the action commenced as to them when their names were put on the record.

Mesne profits—Estoppel of judgment in ejectment. The verdict and judgment in the ejectment are conclusive of the plaintiffs' right to recover the mesne profits only from the time the action of ejectment commenced down to the execution of the *habere facias*, and where they claimed mesne profits prior to the time of bringing their suit in ejectment, they opened the question of their title and of the possession of defendants for such prior time, and neither the judgment in ejectment nor any of the proceedings therein estopped the defendants from having their rights again passed upon, or the same evidence again submitted to a jury.

Evicted lessee—Measure of damages—Rent. Defendants, in an action for mesne profits, had leased premises for a term of fifteen years, at an annual rental of \$2,000, besides the payment of royalty on each ton of iron ore mined, and received the rent for one year, but the premises were in no way injured and no ore was taken therefrom. Defendants, having been evicted by plaintiffs, became unable to fulfill their covenants in the lease, and lessees thereby acquired a right of action against them for damages. *Held*, that the \$2,000 received by defendants did not, under these circumstances, establish a correct basis for fixing the just rental value of the premises.

Quantity of land embraced in leased tract—Question for jury. Where there was a conflict of testimony, the question of fact as to the quantity of land in a certain tract embraced in a lease should have been left to the jury, and it was error in the court to assume that a certain number of acres were contained therein.

Evidence of increased value of mine due to development—Expert. To show the increased value given to premises by improvements in developing mines, a witness was called who knew the premises before and after improvements were made, had large experience in ore and iron,

¹ *Ege v. Kille*, 10 M. R. 212.

knew the character of the improvements, the ore banks in question, and was familiar with mining operations in the vicinity. *Held*, that the witness had sufficient knowledge to form an intelligent opinion of the value of the premises before and after development, and other evidence showing some of the improvements to have been of a permanent and valuable character having gone to the jury, the testimony of the witness should have been admitted.

Error to the Court of Common Pleas of Cumberland County.

This was an action of trespass for mesne profits brought by Caroline Ege and others against Charles Wharton and John T. Kille.

The lands of which the mesne profits were claimed were recovered in an action of ejectment brought on the 7th day of June, 1872, by William Cox and others against Edward Noble and others (see 29 P. F. Smith, 15) in which action the parties plaintiff in this suit, the heirs of Elizabeth Ege, deceased, were admitted as plaintiffs on the 24th of April, 1874, and John T. Kille admitted to defend as landlord on the 12th of October, 1874. The original plaintiffs were nonsuited and a verdict was found for the new parties plaintiffs on the 16th of October, 1874, and possession given them on the 26th of same month.

The mesne profits claimed were those derived from the ore mined and carried away from these lands by the defendants and their lessees, and the rents received by Kille under leases.

It appeared that Kille, who claimed to own the lands in 1869, through his agent, Wharton, opened an ore bank thereon, and between November, 1869, and October, 1870, mined, carried away and sold ore to the value of \$6,950.55.

That on the 21st of October, 1870, Kille leased to the firm of Ginterman & Robertson a portion of these lands for a term of fifteen years, in which the firm bound themselves to mine a certain quantity of ore, and to pay to Kille 75, and after July 1, 1871, 50 cents per ton royalty thereon, and that under this lease, from January, 1871, to August, 1874, Kille received a royalty of \$6,941.61.

From another lease of a portion to James Lanagan, for a like term, the stipulated royalty being 50 cents per ton, Kille

received between the 2d of July, 1872, and 30th of September, 1874, the sum of \$6,009.03.

On the 30th of January, 1873, he leased to Seyfert, McManus & Co. 75 acres for a term of fifteen years at an annual rental of \$2,000 and 50 cents per ton royalty on every ton of ore mined and carried away in excess of 4,000 tons. On this lease Kille received one year's rent, \$2,000, but it was admitted that no ore was taken from the leased premises.

Plaintiffs gave in evidence the record in the ejectment suit, and then proceeded to show how long the defendants had been in possession and the profits made by them from the lands.

The defendants contended that the action of ejectment did not exist as to the Ege heirs until the time they came upon the record, April 24, 1874, and that if the plaintiffs were permitted to show mesne profits anterior to this time, the defendants might show their title to the land as to such anterior profits. They also contended that plaintiffs had no claim to the rent paid by Seyfert, McManus & Co., and that defendants should be allowed for the improvements made upon the lands.

The questions raised in the case will appear from the following rulings of the court below, upon the admission of evidence, the answers to points and charge to the jury.

The defendants offered to show by certain conveyances and drafts the location of the lands, and what portion of them claimed in the action of ejectment were embraced in the leases in question, for the purpose of showing title in the defendants in this case to the lands for which mesne profits were sought to be recovered, prior and up to the time the plaintiffs proceeded in ejectment for its recovery, and in answer to their claim for mesne profits prior to said action.

The court said: "The offer proposes to go into the question of title prior to the action of ejectment. Now the record and proceedings and the record of trial in the ejectment, show that the same evidence of title was then introduced by the defendants on the trial and passed upon, and that the title on which the plaintiffs recovered extended far beyond the time within which, in this action, mesne profits are claimed. To admit the evidence would be simply to start upon a re-trial of the same questions as those actually tried and determined in

the ejectment and nothing more. We can discover no good or legitimate purpose in doing this in the trial for mesne profits.

"That part of the offer which proposes to go into the question of title is therefore rejected. But so much of the offer as proposes to prove that any part of the profits claimed was taken from the land not embraced within the limits of the land recovered in ejectment, is admitted."

Defendants excepted and bill sealed.

Defendants then offered certain deeds of lands and the considerations paid therefor, for the purpose of showing that defendants were *bona fide* purchasers in possession under title, or color of title, and to be followed by evidence of permanent improvements to the property of which the plaintiffs seek to recover mesne profits.

The court said: "By reference to the record of the trial in ejectment, it will be found that the same deeds of conveyance were then introduced in evidence and passed upon, and we do not think it will aid us in this trial to re-try the same questions then raised and passed upon. So far as the offer is to prove color of title, it is rejected, but so far as the offer is to show permanent improvements made by the defendants on the property it is admitted."

Plaintiffs and defendants excepted and bills sealed.

E. F. Haskill, a witness on the stand, having stated that he had known the country where the ore banks of Ginterman & Robertson and Lanagan are located, since 1838, and that he had been in the iron and ore business since 1856, the defendants proposed to prove by him the value of the land upon which these banks are located, with the knowledge that there was ore in it, but undeveloped, and what the value of it is now with the improvements for mining ore erected on it; and this for the purpose of showing to what extent the property has been increased in value by the labor and expenditures of the defendants in developing the ore, and the improvements erected, and to show that the plaintiffs have not sustained any damage from the act of the defendants.

Plaintiffs objected, and the court rejected the testimony.

The eighth point of plaintiffs was as follows, with which is given the answer of the court:

8. In no case are defendants entitled to credit for loose property, and temporary structures put and left on plaintiffs' land by the defendants' lessees, but the improvements, to entitle them to credit, must be of a permanent kind, evidently made for the permanent benefit of the land, and giving a permanent increase of value to it; and it is for the jury to say whether the improvements are, or are not, permanently beneficial to the land, and such as should entitle defendants to credit.

Answer: "The point is answered in the affirmative. The law is correctly stated."

The points presented by defendants and the answers of the court were:

1. The writ in ejectment to No. 230, August term, 1872, having originally been served in the names of the heirs of William Cox, deceased, who were non-suited on the trial of the case, and a verdict and judgment in the case having been entered in favor of the heirs of Elizabeth Ege, deceased, who did not come upon the record as plaintiffs until April 24, 1874, the action did not exist as to them until that date.

Answer: "In a general sense this proposition is correct, but it must be understood that the moment the heirs of Elizabeth Ege came upon the record as plaintiffs, they became engrafted upon the action as such, and all the legal consequences of the action attached to them the same as if they had been of the original plaintiffs."

2. To entitle the plaintiffs to recover in this action the mesne profits for the time anterior to the existence of the action of ejectment, they must show their title and the possession of the defendants.

Answer: "This point is answered in the affirmative, and we think the plaintiffs have done this. They have shown the possession of the defendants and their lessees from the fall of 1869, and have also shown their own title by the record and proceedings in ejectment. The verdict and judgment in their favor show the recovery of the title by the plaintiffs, and the charge of the court below and the assignment of error in the Supreme Court in affirming the judgment, show unmistakably the character and extent of the title set up by the defendants in that trial to defeat the plaintiffs' recovery."

3. The verdict and judgment in the ejectment are conclusive against the defendants only from the date of the action to the time when the plaintiffs were put in possession of the property, and the evidence or notes of the trial as kept by the court in that case can not be resorted to for the purpose of seeing what title the plaintiffs recovered on, or to show title in them before the action was in existence as to them.

Answer: "This point is affirmed generally. But where, as in this case, the record and proceedings in the ejectment show unmistakably the same continuous title in the plaintiffs down to the verdict and judgment from a time anterior to that for which mesne profits are claimed, although claimed anterior to the service of the writ of ejectment, the defendants will not be permitted, on the trial of the action for mesne profits, to set up in defense the same title as that defeated in the ejectment. On the trial of a subsequent action of ejectment it would be different. By the record and proceedings in ejectment we take in not only the verdict and judgment, but also the charge of the court below, the assignments of error passed upon by the Supreme Court and the opinion of the Supreme Court, all of which we think should be taken notice of in the action."

4. The action of ejectment having had no existence as to the plaintiffs prior to 24th April, 1874, and they having been put in possession of the property on 26th October, 1874, and having shown no title in themselves prior to 24th April, 1874, they can only recover in this action the profits received by the defendants from April 24, 1874 to October 26, 1874.

Answer: "Refused; we have already instructed you as to this."

6. The lease of Seyfert, McManus & Co., providing for a rental of \$2,000 per annum with the privilege of taking out ore therefrom in years succeeding that in which the rent may be paid, and it being admitted that none has been taken, and if the lease to them is on the Cox land, the recovery by the plaintiffs in the ejectment evicted Seyfert, McManus & Co. and made Mr. Kille liable to refund the \$2,000 they paid to him, and the plaintiffs can not therefore hold him, in this action, responsible for the amount he received from Seyfert, McManus & Co.

Answer: "We can not answer this point as requested. It is

true that the recovery by the plaintiffs in the ejectment operated as an eviction of the tenants, as between them and Kille, but whether or not Kille is liable or may ever be called upon to respond in damages to Seyfert, McManus & Co. does not affect the plaintiffs' rights to the rental received by Kille from that part of the plaintiffs' lands covered by the lease to Seyfert, McManus & Co."

8. The value of the permanent improvements put upon the ground in the form of machinery, buildings, and conveniences for the mining of ore, may be set off against the value of the ore in place before it was mined; and if the jury believe that the value of those improvements—machinery, buildings and conveniences—equaled or exceeded the value of the ore in place, then their verdict should be for the defendants.

Answer: "This point is answered in the affirmative, with this qualification, however, that no improvements can be allowed for save such only as were put upon the ground prior to the — of June, 1872, and which the jury are satisfied are of a beneficial, useful and permanent character. Improvements made and put upon the ground after the — of June, 1872, are not proper subjects of compensation as a set-off to the value of the ore in place, yet in so far as such improvements were used in carrying on and conducting the mining operations, the cost and expense of making and putting them on the ground should be taken into account by the jury in ascertaining the value in place of the ore mined and carried away."

In the general charge the court, HERMAN P. J., said:

"From the conflict of the testimony we can not instruct you peremptorily which is the true eastern boundary of the Louis Foulke tract, and therefore submit the matter to you, who are the proper persons to determine the fact.

["If you determine that the red marked line is the true eastern boundary of the Louis Foulke, then the Cox must come up to it; and this would put fifty-two acres of the Seyfert, McManus & Co. lease on the Cox. But if you determine that the true eastern boundary of the Louis Foulke is the line as located by Evans, eighty perches eastwards from the red marked line, then but two and a half acres of the Seyfert, McManus & Co. lease would be on the Cox. Thus upon

your determination of the true eastern boundary of the Louis Foulke will depend the proportion of the rents and profits of the Seyfert, McMannus & Co. lease which the plaintiffs will be entitled to recover for.”]

And again :

[“ The evidence shows that the defendants and their lessees made improvements on the premises both before and after the time of bringing the action of ejectment. Whatever improvements of a permanent and valuable character the defendants or their lessees made and put upon the premises prior to the time of bringing the action of ejectment, are proper and legitimate subjects of compensation to the defendants; and their value to the plaintiffs, estimated in dollars and cents, must be recouped from and set off against the plaintiffs’ claim for mesne profits in this action.”]

The verdict was for the plaintiffs for \$12,933.40.

Defendants sued out this writ and the errors assigned were 1, 2, 3, 4, 5, 6: the answers of the court to the points submitted by the defendant.

7: the court’s answer to plaintiffs’ eighth point.

8, 9: to the portion of the charge in brackets.

10, 11, 13: the rejection of the offers of evidence on the part of defendants.

LEMUEL TODD and JOHN HAYS for plaintiffs in error.

S. HEPBURN, Jr., and S. HEPBURN, for defendants in error.

Mr. Justice MERCUR delivered the opinion of the court.

While due effect should be given to the statute authorizing amendments, yet care must be taken that they be not so used as to pervert their true spirit. None of the defendants in error were originally parties to the action of ejectment, the record of which they gave in evidence. They were substituted some two years after the writ issued. The original plaintiffs had no title and were nonsuited. The defendants in error did not derive title from them but recovered their own title solely. It was in no wise connected with the original plaintiffs. The so-called amendment was not the addition of names

omitted through mistake, nor of parties holding any joint interest with the original plaintiffs. There was no privity of title or interest between them. They were strangers to each other's claim. The substitution was not authorized by the statute. That question, however, is not now before us on bill of exceptions. The substitution having been made, and the record being given in evidence in a subsequent suit, we may declare its effect.

Amendments depriving the opposite party of any valuable right shall not be allowed; hence when the name of a person was added as plaintiff in ejectment after suit brought, it was held, that if at the time of the amendment the title of the new party was barred by the Statute of Limitations, he could not recover: *Trego v. Lewis*, 8 P. F. Smith, 463; *Kaul v. Lawrence*, 23 Id. 410. It follows, therefore, that although the defendants in error were substituted without objection, yet they thereby acquired no rights relating back to their substitution. As to them, the action commenced when their names were put on the record. The first assignment is sustained.

The 2d, 3d, 4th, 10th and 11th assignments will be considered together. The action of ejectment was a legal averment of the right of the plaintiffs therein to the possession of the land. By their recovery that right was established. In this subsequent action for mesne profits, the verdict and judgment are conclusive of their right to recover damages from the time their action commenced down to the execution of the *habere facias possessionem*: *Drexel v. Man*, 2 Barr, 271. But when they sought to recover for damages or profits prior to their action, the verdict and judgment were not conclusive as to such prior time. They were then required to prove their title; for the record only showed that they recovered the term mentioned from their substitution: *Hare v. Fury*, 3 Yeates, 14; *Bailey v. Fairplay*, 6 Binn. 450; *Osbourn v. Osbourn*, 11 S. & R. 58; *Huston v. Wickersham*, 2 W. & S. 308; *Postens v. Postens*, 3 Id. 183; *Drexel v. Man*, *supra*; *Sopp v. Winpenny*, 18 P. F. Smith, 80.

The evidence in the action of ejectment by which the right of possession was sustained must not be confounded with the right itself. The direct issue in the case was their right to possession at the time they came on the record. That issue

having been found in favor of the plaintiffs therein, cannot be questioned in the present case. But it is well settled that the estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matter, though it may have arisen or been passed upon: *Duchess of Kingston's Case*, 11 Harg. State Trials, 261; *Moulton v. Libbey*, 15 N. H. 480; *Campbell v. Consalus*, 25 N. Y. 613; *Hibsham v. Dulleban*, 4 Watts, 183; *Lentz v. Wallace*, 5 Harris, 412; *Martin v. Gerna dt*, 7 Id. 124; *Lewis' App.*, 17 P. F. Smith, 153.

It is urged that the charge of the court below, in the action of ejectment affirmed here, is a part of the record, and that it and the other proceedings in that case show the same title now set up by the plaintiffs in error was there adjudged to be invalid.

It is true the charge of the court and the evidence may be made a part of the record for the purpose of reviewing the correctness of the rulings in the particular case: *Northumberland Bank v. Eyer*, 8 P. F. Smith, 97; but at common law they are no part of the record: *Erb v. Scott*, 2 Harris, 20; *Hageman v. Salisbury*, 24 P. F. Smith, 280. They are preliminary or incidental to the main issue concluded by the verdict and judgment. For the purpose of enforcing the particular judgment they may be deemed a part of the record: *Hageman v. Salisbury*, *supra*. Their conclusive effect in a collateral suit is another question.

It was held in *Packet Co. v. Sickles*, 5 Wall. 592, and in *Coleman's App.*, 12 P. F. Smith, 252, that the plea of judgment recovered may be sustained by a mixed matter of record and of fact. But when extrinsic evidence is given for that purpose, it must be consistent with the record; and unless it be shown that the verdict and judgment necessarily involved its consideration, it will not be conclusive.

Thus far we have considered the effect to be given to a judgment in those cases where one judgment is conclusive. The verdict and judgment in this ejectment did not necessarily involve the title nor the possession prior to the commencement of the action. They were conclusive for the recovery of mesne profits only, and for that purpose only from the time of the commencement of the suit.

In a second action of ejectment between the same parties the verdict and judgment would not be conclusive. Every fact and conclusion found in the first suit might be controverted in the second. Hence when in this action the defendants in error claimed for mesne profits prior to bringing their suit in ejectment, they opened the question of their title and of the possession of the opposite party for such prior time, as fully as it would have been by a second action of ejectment. Neither the prior judgment in ejectment nor any of the proceedings therein estopped the plaintiffs in error from having their rights again passed upon, nor from having the same evidence considered by another jury. The assignments are therefore substantially sustained.

The fifth assignment relates to the plaintiffs in error being charged in this action with the money which they had received from Seyfert, McManus & Co.

In an action for mesne profits the plaintiff may recover for the fair rent or yearly value of the premises, and for injury done thereto: *Huston v. Wickersham*, *supra*. Compensation is the proper measure of damages: *Morrison v. Robinson*, 7 Casey, 456. The action is equitable in its character: *Zimmerman v. Eshbach*, 3 Harris, 417. Hence a *bona fide* occupant under claim of title who has made permanent and valuable improvements, may show them to be a full compensation for the use of the premises: *Morrison v. Robinson*, *supra*. The fact that the plaintiffs in error had let the premises for a term of fifteen years at an annual rental of \$2,000, besides the payment of royalty on each ton of iron ore mined, and received the rent for one year, did not necessarily give the defendant in error the right to recover that sum. It appears that no ore was mined by the lessees during the time for which the plaintiffs in error are liable for mesne profits. By their eviction they became unable to fulfill their covenants in the lease. Their lessees acquired a right of action against them for damages which may equal or exceed the whole sum they have received. Then if the premises were in no wise injured by the lessees, and they took no ore therefrom, we can not see that the \$2,000 received by the plaintiffs in error establishes a correct basis for fixing the just rental value of the premises. The receipt thereof under the circumstances establishes no

just compensation for the rights withheld nor for injuries sustained. The point covered by this assignment should have been affirmed.

We are not furnished with the draft showing the "red marked line" referred to in the eighth assignment. We understand it is also called the "Pine Grove line." John Evans testifies: "Taking it for granted that the line marked with red marks is the western boundary of the Cox tract, there would only be about twenty acres of the Seyfert and McManus lease on the Cox tract." David Peeler testifies: "Taking it for granted that the Pine Grove line is the western boundary of the Cox tract, there would only be about twenty or twenty-five acres of the Seyfert and McManus lease on the Cox lands." Both of these witnesses were surveyors and had surveyed the lands in controversy. The number of acres was for the jury to find, and the learned judge erred in inadvertently assuming fifty-two acres to be the correct quantity.

The evidence covered by the thirteenth assignment was offered for the purpose of showing substantially the increased value given to the premises by the improvements and expenditures made by the plaintiffs in error in developing the mines. The witness knew the premises both before and after those improvements were made. He had had large experience in the ore and iron business. He knew the character of those improvements. He knew the ore banks in question, and was familiar with mining operations in that vicinity. He therefore had sufficient knowledge to form an intelligent opinion of the value of the premises both before and after their development. Those two valuations being ascertained certainly threw some light on the value of the improvements. Other testimony had shown some of the improvements to be of such a permanent and valuable character as to make them the proper subject of consideration by the jury: *Morrison v. Robinson, supra*. We do not think the mode of proof was so objectionable as to justify the exclusion of the testimony.

In so far as the other assignments are not covered by what we have already said, they are not sustained.

Judgment reversed and a venire facias de novo awarded.

DICKSON ET AL. V. MOFFAT.

(5 Colorado, 114. Supreme Court, 1879.)

¹ **Use and occupation of placer claim—Implied promise to pay rental.** In an action to recover the value of the use and occupation of certain placer mining claims it was *held*: Where one contemplates entering into possession of the lands of another to occupy for use, and is informed by the lessor that he can do so upon terms stated, or for a reasonable compensation, and the party thereafter makes entry, and occupies and uses the lands, it is a good acceptance of the terms proposed, and he will become thereby bound under an implied contract to pay the sum named; or, if no sum is named, then such price as the use was reasonably worth.

Practice on appeal. When the trial is to the court, the finding will not be disturbed unless manifestly against the weight of evidence.

Appeal from the District Court of Summit County.

The facts are stated in the opinion.

J. W. HORNER and R. D. THOMPSON, for appellants.

C. C. POST, for appellee.

STONE, J.

The appellee had judgment in the court below. The case was tried by the court upon agreement of the parties, without the intervention of a jury, and is brought up by appellants, who were defendants in the court below. The principal error assigned is that the findings and judgment of the court are against the weight of evidence in the case. Plaintiff sued to recover, as for rent, the value of the use and occupation by defendants of certain placer mining claims. There was evidence that before defendants entered upon the ground to work, they were informed by plaintiff's agent that they would have to pay \$300, if they worked the claims of plaintiff; that the defendants objected to the price named, but thereafter went upon the ground and worked during that mining season, taking therefrom a large amount of gulch gold; that in the fall, when

¹ *Alderson v. Ennor*, 8 M. R. 526.

they settled up with the plaintiff's agent, with whom they had been working as partners upon several claims in connection with the claims of plaintiff, the defendants refused to pay the \$300 then demanded for the use of plaintiff's ground.

Upon the hearing the court, as appears by the record, found :

First. That defendants, jointly with one Michael L. Coatney, worked certain mining claims, the property of the plaintiff, to wit: No. 8 in 5th tier, and No. 7 in 6th tier, below discovery on west side of Gold Run, Union Mining District, Summit county, during the mining season of the year 1874.

Second. That said Coatney was, at and before the said working, the duly authorized agent of said plaintiff; that prior to said work being done, Coatney informed defendants that if said claims were worked by them they should pay \$300 for the use of said claims.

Third. That no agreement was reached at the time of this conversation, but that the defendants, by proceeding to work said claims, by not claiming they had a previous contract with Coatney to work the property on other terms, by admissions to witnesses Thorne and Peabody, conceded the demand to pay plaintiff the sum of \$300 as the defendants' proportion for the use of said premises; and that defendants have failed to prove that the prior contract relied upon by them included these claims, unless they should pay a consideration therefor.

Fourth. That in July, 1871, defendants and said Coatney became partners, to pre-empt and work five certain claims in vicinity of plaintiff's claims, to share profits and expenses equally, and that the two claims of plaintiff above mentioned, with three others of plaintiff's claims, were to be included in the partnership arrangement, on same terms, except that a reasonable sum was to be paid plaintiff for use of his claims, but no sum was then mentioned.

Fifth. That said copartnership arrangement was not in writing, but was carried out, and all expenses and profits shared equally between said parties named, including profits from claims of plaintiff, but that defendants have paid nothing, either to plaintiff or his agent, for their share of the use of plaintiff's claims, and that defendants are jointly liable therefor.

Sixth. That the reasonable value of the use of said claims,

while occupied by said parties, is the sum of \$500, two thirds of which defendants are liable to pay.

Seventh. The court therefrom finds that defendants are justly indebted to the plaintiff in the sum of \$300.

It is contended by counsel on behalf of the appellants, that they never accepted the proposition to pay the sum of \$300, or any other sum, for such use of plaintiff's ground.

Where one contemplates entering into the possession of the lands of another to occupy for use, is informed by the lessor that he can do so upon terms stated, or for reasonable compensation, and the party thereafter makes entry, occupies and uses the land, it is a good acceptance of the terms proposed, and he will become thereby bound, under an implied contract, to pay the sum named; or, if no sum is named, then such price as may be established by evidence to be what the use was reasonably worth.

It is also insisted that if the evidence shows any contract at all, it was a contract for the *sale* of the claims in question to appellant. This theory is inconsistent with the testimony of appellants themselves—that they received no deed for the property and had no title therein, and that they did not therefore sell the claims when they sold their own property, and that they never paid plaintiff anything, either as purchase price or rent. The contract was substantially a lease.

It is further contended that appellants were entitled to the use of the ground during the year they worked it, 1874, by virtue of an alleged verbal contract made with plaintiff's agent in 1871. But if such verbal contract can be considered as binding under the statute, beyond the period of one year from the time it was made, this, nevertheless, can not avail the appellants, since under this agreement they were to pay a reasonable compensation for the use and occupancy of the plaintiff's claims, and in this respect the evidence supports the judgment. The contract was a very loose one, and of such a character as should never be entered into without a full understanding by the parties, and committed to writing; but from a review of the whole evidence, we are satisfied the findings of the court below and judgment thereon are fairly sustained by the testimony, and under the familiar rule laid down in *Barker v. Hawley*, 4 Col. 317, the finding will not be disturbed

unless manifestly against the weight of evidence. The judgment will be affirmed.

Judgment affirmed.

Justice BECK, before whom, as district judge, the case was tried below, did not sit.

CROSS V. McCLENAHAN ET AL.

(54 Maryland, 21. Court of Appeals, 1880.)

Penalty not enforced in equity. A court of equity will not entertain a bill filed against lessee of stone quarries to enforce the penalty under the statute 4 Geo. II, Ch. 28, nor compel a discovery in aid of an action to enforce the penalty against a tenant holding over.

Idem. Equity will sometimes relieve against, but will never enforce a penalty.

Rent and yearly value not synonymous. The penalty intended in the statute 4 Geo. II, Ch. 28, is double the "yearly value" of the lands detained, and not double rent.

Appeal from the Circuit Court for Cecil County, in equity.

The case is stated in the opinion of the court.

The cause was argued before BARTOL, C. J., GRASON, MILLER and IRVING, JJ., for the appellant, and submitted on brief for the appellees.

WM. IRVINE CROSS and E. J. D. CROSS, for the appellant.

W. J. JONES, for the appellees.

IRVING, J., delivered the opinion of the court.

From the affidavits filed in this cause respecting the tardiness in the transmission of the record to this court, it is evident that the appellant is in no wise chargeable with *laches*, or fault in the premises, so that the case is properly before us for review.

This is an appeal from a decree of the Circuit Court for Cecil County, sitting in equity, dismissing the appellant's bill of complaint. The bill charges that the appellant owns certain quarries in Cecil county, which, from year to year, for many years, down to and including the year 1870, the appellees have been renting from appellant upon the following terms, to-wit: "Fifty cents for every perch of stone taken from the quarries of the quality known as dimension stone; twenty-five cents for every perch of large building stone, and twelve and one-half cents for every perch of small building stone or rip-rap stone," at which rates for some years the appellees accounted with and paid the appellant. That about the 2d of June, 1870, the appellants served a legal written notice on the appellees requiring them to quit the premises at the end of the current year, viz.: the 31st of December, 1870. The bill further charges that the appellees did not vacate and surrender the premises in accordance with the notice to quit, but wrongfully continued in possession and held on, and afterward fraudulently pretended to hold the premises of persons other than the appellant, by reason of which wrongful holding over, retention of possession, and refusal and neglect to account with the complainant as to the amount and quality of stone taken from the quarries, he is unable to state an account or bring suit at law or distrain for the same. The bill charges that by reason of the wrongful retention of possession by the appellees of appellant's property, they have become liable for double rent, to wit: double the several prices for stone taken from the quarries which by the contract of renting they were to pay and render. The prayer is for discovery and an account, that the appellees may be decreed to pay double rent, and such relief as their case may require.

The answer admits, in effect, the renting of the property from the appellant, and the payment of rent therefor by a per centage on the stone quarried, and the receiving a notice to quit at the expiration of the year 1870; but they deny that they did not abandon the premises, as they were required by the notice to do; on the contrary, they aver that they ceased working the quarries and left nothing on the premises but an old crane and an old shed or shop which were not worth removing, and that the appellant could at any time have

entered without molestation into possession of his premises; but that the appellant was not satisfied with the abstinence of the appellees from working the quarries or interfering with them, and resorted to the provisions of Article 53 of the Code of Public General Laws of Maryland to regain possession, which was not denied him. That two justices of the peace caused a jury to be summoned, and a trial was had, and a verdict was rendered that the appellees were not withholding possession from the appellant. It also denies the appellant's title. To this answer a general replication was filed, testimony was taken, and the case proceeded to hearing and decree, which dismissed the bill.

In the view we take of this case it is unnecessary for us to decide whether the full and unqualified relation of landlord and tenant ever existed between the parties to this suit, or whether the notice given the appellees to quit was a legally sufficient notice, or whether the defendants (appellees) obeyed the notice and abandoned the premises to the appellant, or wrongfully held over as charged in the bill; for, conceding all the allegations of the bill of complaint to be true, they have not made a case which will justify the interposition of a court of equity. The relief which the appellant prays is a discovery, and an account of the amount of stone taken from the quarries of the appellant, and that the appellant may have a decree for the payment of double the rates at which the property was rented. By the prayer of the bill he seeks to recover by decree in equity the penalty imposed on the appellees, (for the wrongful conduct of which he complains), by the statute of 4 George II, Ch. 28. This statute is remedial, with a penalty attached, which is given to the party grieved: *Wilkinson v. Colley*, 5 Burr. 2694. Double rent is no *payment* as between landlord and tenant, but is given as a penalty: Alex. Brit. St., 709, 710.

The statute provides a *remedy* by which the *penalty* which the statute imposes may be recovered. That remedy is "by *action of debt*," and it is the *only* mode provided by which the party aggrieved may get the benefit of its provisions. Special remedies, and more particularly, extraordinary ones, and of a penal nature, must be specially and strictly pursued. *Action of debt* being the form of action prescribed for the recovery of

the penalty, the facts necessary to recovery must be established in that way. In invoking the aid of a court of equity to enforce the penalty given him by the statute, the appellant has gone to a tribunal that *never* enforces a penalty. It often relieves against a penalty, (unless it be imposed by a statute, when it will not interfere) but it never aids in enforcing a penalty: 2 Story's Eq. Jur., §§ 1319, 1326. In § 1319 Story says, "It is a universal rule in equity never to *enforce* either a penalty or a forfeiture." In *Livingston v. Tompkins*, 4 Johns. Ch. 415, Chancellor Kent says: "It may be laid down as a fundamental doctrine of the court, that equity does not *assist the recovery* of a penalty or forfeiture." Here the appellant seeks a *discovery*, that he may have a decree for the penalty which the statute gives him. *Such* aid a court of equity will never give. It is laid down as elementary law in 2 Story's Eq. Juris., Sec. 1494, that equity "will not compel a discovery in aid of a criminal prosecution, or of a penal action; or of a *suit in its nature partaking of such a character*," for it is added "it is against the general principles of equity to *aid in the enforcement of penalties or forfeitures*." Again in Sec. 1509 it is said that discovery will not lie "in a case which increases a penalty, unless the party entitled to the benefit thereof waives it." But if this were not so the appellant does not need the aid of a court of equity and can not resort to it. His remedy at law, either by action of trespass or of debt, under the statute for the penalty, is complete and therefore he has no standing in a court of equity.

By the statute, the penalty which he is entitled to recover by *action of debt* (if he is in position to claim the benefit of the statute) is "*double the yearly value* of the lands, tenements or hereditaments so detained, for so long time as the same are detained," etc. *It is the double value* and not "double rent" which is recoverable; for as is well said by Mr. Alexander in his British Statutes, 711, in some cases double rent would be no penalty at all. No case could better illustrate the meaning of the statute than this one. If the tenants neglected to work the quarry to its capacity, so that it only yielded a pittance to the landlord, which was, he says, the fact, and caused him to desire the surrender, double that pittance would be no penalty for willfully keeping him out of possession of his property. It is clearly the *yearly value* which is to be

ascertained and double *that* is what the statute allows to be recovered. This was the construction which was given that language of the statute in *Timmins v. Rowlison*, 3 Burrows, 1603, and has ever since been followed. It is clear, therefore, that the discovery prayed for would not establish what is to be proved, nor is it a necessary aid to that inquiry; for by the oral testimony of the parties, as witnesses, he could get all he could secure by the discovery he asks by his bill. The remedy is clearly at law and law only. The decree dismissing the bill will be affirmed with costs.

Decree affirmed with costs.

1. Royalties are rents reserved in kind: *U. S. v. Gratiot*, 14 Pet. 526.
2. Rent based on the number of brick manufactured by lessee is a rent capable of being reduced to a certainty and may be distrained for: *Daniel v. Gracie*, 6 Q. B. 145.
3. Lessee contracting to pay royalty on all coals raised, *held*, on general review of the covenants, responsible for coals sold on which payment was not collected: *Edwards v. Rees*, 7 Carr. & P. 340.
4. Installments due upon a deed by which the grantor sells the mines under land are not rent, but personal debts, and not incident to the reversion: *Hatherton v. Bradburne*, 13 Sim. 599.
5. Action to enforce contract for a lease at a stipulated rent: *Carne v. Mitchell*, 2 M. R. 496.
6. Recovery of rent as an equitable debt: *Clavering v. Westley*, 3 P. Wms. 402; but see *Walters v. Northern Coal Co.*, 5 De G. M. & G. 629.
7. When rents and royalties belong to tenant for life: *Daly v. Beckett*, 24 Beav. 114; *Cowley v. Wellesley*, 35 Beav. 638.
8. Rent is no lien; historical review of rents and discussion of relation of rents to the land: *Miners' Bank v. Heilner*, 47 Pa. St. 452.
9. Enforcement of lease calling for rent payable in iron of certain quality: *Lilley v. 50 Associates*, 101 Mass. 432.
10. The rent of a quarry at a certain number of cents per perch (the amount varying with the quality) is a certain money rent within the meaning of the Maryland statute: *Cross v. Tome*, 14 Md. 247.
11. Tenant's returns, in the absence of fraud, when received without objection, conclusive: *Shillingford v. Good*, 95 Pa. St. 25.
12. Receipt of royalty raises implication of tenancy, but the presumption may be explained: *Doe v. Crago*, 6 Com. B. 90.
13. Construction of covenant in lease for payment of royalty from which expenses were to be deducted: *Wolfing v. Ralston*, 61 Cal. 288.
14. Rent may be set off against the price of ore where it arises out of the same transaction: *Iron Cliffs Co. v. Gingrass*, 42 Mich. 30.
15. Rent distinguished from covenant in gross: *Williams v. Haywood*, 1 El. & El. 1040.
16. Rent from minerals non-existent—or from exhausted mine. *Wharton v. Stoutenburgh*, 46 N. J. Law, 151; *Gowan v. Christie*, 8 M. R. 688.

BROWN v. CALDWELL.

(10 Sergeant & Rawle, 114. Supreme Court of Pennsylvania, 1823.)

Consideration of the opinion of the judge below. If the opinion of the president of the court below is filed of record, with the reasons, the court above in error are bound to notice it, though it do not appear to have been filed at the request of either party.

Infant consenting to boundaries. If consentable lines are fairly made between adjoining tracts by a guardian on behalf of an infant and an adult, the latter, or those claiming under him, can not object on the ground of the infancy; and it seems that if the infant do not dissent when he comes of age, but acquiesces, he is forever bound.

Judgment, when not reversible. A party can not reverse a judgment on an answer of the court below favorable to him, or on an answer to an abstract question.

¹ **Replevin of Slate from adverse occupant of quarry.** Replevin does not lie by one not in the actual, exclusive possession of land, whatever title he may claim, against one who is in the actual, visible, notorious occupation and possession thereof, claiming the right, for slates taken out of the quarry on the land.

Error to the District Court for the City and County of Lancaster, in an action of replevin, brought by Jeremiah Brown, the plaintiff below, against James H. Caldwell, the defendant below, in which a verdict and judgment were rendered for the defendant.

HOPKINS and MONTGOMERY, for the plaintiff.

BUCHANAN and ROGERS, for the defendant.

DUNCAN, J., delivered the opinion of the court.

The errors assigned relate to the opinion of the court filed of record, and a preliminary question was made, whether the court could judicially take notice of this opinion, it not appearing by the record to be reduced to writing and filed of record at the request of either party. The opinion was an answer to certain points made in writing, propounded to the court, for their opinion to the jury, by the defendant in error.

¹ *Mather v. Trinity Church*, 14 M. R. —; *Harlan v. Harlan*, 15 Pa. St. 507; *Anderson v. Hapler*, 84 Ill. 436; *Page v. Fowler*, 28 Cal. 605.

The act making it the duty of courts, on the request of either party, to reduce their opinion, with the reasons, to writing, and file it of record, has been found very inconvenient in practice, however beautiful in theory; and though the provision appears, on first view, very simple, yet experience has shown it to be not a little complex. It has, instead of easing the suitor, proved a source of vexation, perplexity and delay, and sometimes of actual injustice. It requires legislative interposition, either by its total abolition, or pruning many of the luxuriant branches which have grown from it and choked the progress to the termination of controversies. The bill of exceptions, its form, its bearing, were well understood, and quite adequate to spreading on the record all legal points decided by the courts, in their instructions to juries.

This opinion is signed by the judge, with his reasons filed of record, and we can not suppose that this was his own voluntary officious act, without the request of either party, but must presume it to be his official act, done by request at the time. It matters not which party requested it; it is of record, and consequently the subject of revision. It differs, in this respect, from a bill of exceptions, which the party taking the exception may use or not, as he pleases. The statute of Westminster 2d, giving the bill of exceptions, is different in its provisions from the act of assembly. The bill of exceptions does not form a part of the record; it is tacked to it. Its authenticity depends on the acknowledgment by the judge of his seal. It is called, emphatically, his bill of exceptions; that is, the bill of exceptions of him who takes it. Being for the benefit of the party who tenders it, remaining in his possession, it is in his breast to employ it or not. If the bill be tacked to the record, and certified by the judges below, it is then a part of the record and comes up with it. But if it be not, then it seems necessary for the judge to come into court, and acknowledge his seal affixed to the bill: *Clerk v. Russel*, 3 Dall. 415. But an opinion filed, instantly becomes a part of the record, and subject to revision.

The action was replevin, for a certain quantity of slate taken out of a slate quarry by the defendant in error and defendant below, and manufactured by the defendant, the title in the soil being claimed by both.

There are only two questions which have arisen and been argued here, upon the instruction given by the district court, in the answers to two questions proposed by the defendant in error, and to which alone the court have directed their attention.

The first was, "that if the jury believed that the plaintiff and the guardian of the defendant made a consentable line between the property of the defendant and the plaintiff, the plaintiff could not recover in the suit; that the line concludes the parties." *Answer:* "Where adjoining landholders, apprised of their rights, or to compromise doubtful rights or possessions, establish a line, which is called a consentable line, and hold accordingly, such consentable line will be conclusive."

The objection made to this is, that the court applied a principle which is good law between adults, to a case between an adult and infant, acting by his guardian, and that the infant is not bound by the act of the guardian. The question was a general one, and was answered generally by the judge. His attention was not called to any discrimination of acts by infants and adults. It was an abstract proposition, and received a proper answer. If the plaintiff had desired to have the opinion of the court whether this consentable line was binding on the defendant, he being an infant, and being made by his guardian, he should have desired the opinion of the court on his hypothesis. But the answer must have been the same; it must have been adverse to the plaintiff.

It is no question, it can not be made a question, but that consentable lines, settlement of boundaries, and holding by them, would, unless there was some fraud practiced or undue advantage taken of the ignorance of one party, the other being conversant of the real lines, be conclusive between persons competent to bind the rights. So I would hold that a fair settlement, so made by guardian, and acquiesced in by the infant holding the possession after he came of age, would amount to a confirmation. These settlements of boundaries are common, beneficial, approved and encouraged by courts, and ought not to be disturbed, though it was afterward shown that they had been erroneously settled, if they have been acquiesced in for a number of years: 11 Johns. 128.

The marks on the ground are frequently obliterated, and

sometimes very obscurely made, of division lines; and where several adjoining tracts are surveyed at the same time, for the same person, never made at all, but depending solely on paper. Convenience, policy, necessity, justice, all unite in favor of supporting such an amicable adjustment of that which it is extremely difficult to ascertain, to a mathematical certainty.

If this settlement of boundary had been made by the infant himself, it would not have been void, but voidable by him on his arrival at full age. Continuing the possession up to the boundary, would have been a confirmation of it. In *Cecil v. Salisbury*, 2 Vern. 224, the plaintiffs, the younger children of the earl of Salisbury, brought a bill for the execution of a trust, under the will of their father, for raising their portions and maintenance, and prayed the trustees might be decreed to sell. The defendant, whilst a minor, desired the trust estate might not be sold, and offered to subject other lands for the better raising of the portions, so that then a sale would not be necessary. The question was whether, being a minor, he should be bound by this offer in his answer. .

“PER CURIAM.—We shall hold him to his offer. If he had departed from what he had offered, he ought immediately, when he came of age, to have applied to the court, to have retracted his offer, and amended his answer. But when he came of age he made no complaint, either that he had been deceived or defrauded, or an improper defense made for him, (and this defense must have been by guardian,) but acquiesced in the answer to this time. This court has often decreed building leases for sixty years when for infant's benefit. A common recovery suffered by infant is good, and if the court are satisfied it is for the good of the infant, will take it. If an exchange is made, and infant continues in possession after he comes at age, he shall be bound by it. So where a jointure is made after marriage, if after the death of husband the wife enters, she shall be bound by it. In *Sir Edward Mosely's case*, where a provision was made for his lady, in lieu of her jointure, by articles during coverture, she, after the death of her husband, entered on £46 per annum, part thereof only, and she thereby was held obliged to perform the whole articles; and the *Lady Widrington's case* was cited, where she and her husband

agreed to an inclosure, and she was bound by it, even as to her jointure."

That the infant acquiescing in the settlement of boundaries after he came of age, would be bound by it, is supported in principle by many cases both at law and equity. The act of a guardian, when a reasonable one, if acquiesced in by the infant, will have the same consequence as if done by the infant at full age; otherwise, if wantonly done by the guardian, without real benefit to the infant: *Pierson v. Shore*, 1 Atk. 480. In *Smith v. Low*, 1 Atk. 490, R. L. devised some land, and houses built thereon, to his six children. The mother, as guardian to the children, who were all infants, demised the premises on a building lease for forty-one years. They all attained twenty-one, and accepted the rent for above sixteen years. After the youngest came of age, they brought ejectment against the lessee, who, by his bill, prayed to have his lease established under the circumstances, particularly, the acceptance of rent for sixteen years; the court decreed the lease to be established during the residue of the term. But supposing it not binding against him, or them who stand in his place, could the plaintiff object to it on that account? I think not, so as to make the party a trespasser, without notice of his dissent. For if an infant, or his guardian, were to surrender an unprofitable lease, and after acceptance the premises should be burned, overflowed, or otherwise destroyed, the lessor could never say the surrender was void. There is no instance where the other party to a deed can object on account of infancy. Consequently, the infant may let the surrender stand. If he avoids, it should be recently after his arrival at age, and this proves it to be voidable only: *Zouch v. Parsons*, 3 Burr. 1807. But where there has been a settlement of boundary by a guardian for his ward, acquiesced in and confirmed by the ward after his arrival at full age, and by the adult, that the infant can avoid that settlement even though the boundary was somewhat erroneous, I very much doubt. The inclination of my mind is that he can not. But that the adult can not, I have no manner of doubt. The answer to the defendant's question should have been in terms, that he could not. Of the omission to do this, the defendant has no just cause to complain.

Of the answer to the defendant's second question, the de-

fendant's complaint is groundless, if the learned judge intended to state that the action of replevin would lie for the slates taken out of the quarry, of which the defendant was in possession under claim of title, with a settled boundary between his guardian and plaintiff, and which both held under until the time of the supposed taking and trespass, if the plaintiff showed an original title prior to the defendants. It was an error, injurious to defendant; certainly favorable to the plaintiff. A party shall not reverse a judgment for an error which is beneficial to him. Nor will a judgment be reversed for an erroneous opinion upon an abstract question, unless some injury would have arisen therefrom to the party appealing. This court sits to give redress to persons grieved by decisions of inferior courts: 2 Hen. & Munf., 55. But taking the answer altogether, giving it a fair construction, I do not think the judge intended to put the jury on the question of title, but of possession on a claim of title. For certainly, replevin is not the proper form of action to try title to land *ex directo*, though incidentally, title in such action may sometimes be called in question. In Pennsylvania this action has been allowed a great sweep, and to embrace every question of property. But it is property in goods, and not in lands. It is to try the title to personal property, and not real estate. Replevin will not lie for a tract of land. Title can not be decided in an action merely personal and transitory, no matter whether replevin, trover or assumpsit. Nor can these actions be maintained by one not in the actual, exclusive possession, whatever his title may be—against one who is in the possession, claiming right. Here the possession is not vacant; the owner of the title is in the constructive, actual possession. The reasons are fully stated in *Mather v. Trinity Church*, 3 S. & R. 509, and *Baker v. Howell*, 6 Id. 476. If it could lie in this case, then replevin would lie by the owner of the soil for coals dug out of a coal mine in England and brought to Pennsylvania, and the title to the soil in a foreign nation be tried in this transitory action. The owner of a tract of land in Clearfield county, whose timber had been taken by a trespasser, and sawed into boards, follows them into Lancaster county, and replevies them in the streets of the city. The doctrine of *venires* shows that this can not be the law. An-

ciently, a jury of one county could not try any matter arising in another county. A foreign county was almost as formidable a thing as a foreign country. If the action be personal and transitory, the venue may be laid in the county where trying; because these follow the person; but of matters arising in a foreign country or county, not transitory, but local, such as the prosecution of a title to lands, or a trespass committed on lands, where the title *in solido* and *ex directo* is the ground of action, there is no jurisdiction but in such place. But if the right to land was to become an incident in an action personal, for instance, a contract respecting the conveyance of land mixing with the cause of action, it might be tried anywhere. This subject was very fully considered in the action of trespass brought by *Edward Livingston, Esq.*, against *Thomas Jefferson, Esq.*, 1 Brock. 203, and a very able opinion given by Marshall, C. J., against the jurisdiction. When I speak of possession, I mean an actual possession and occupation; not a bare solitary trespass by an intruder, but an actual, visible, notorious possession and occupancy.

The plaintiff has failed in supporting the errors assigned and judgment must therefore be affirmed.

Judgment affirmed.

MORRIS v. DEWITT.

(5 Wendell, 71. Supreme Court of New York, 1830.)

¹**Second replevin irregular.** Where DeWitt had replevied 350 tons of iron ore, which Morris caused to be seized on a second writ of replevin, such second writ was quashed on motion, and the court refused to hear affidavits of ownership filed by the party suing out the second writ.

Writ of replevin. On the 19th May, the defendant, DeWitt, sued out a writ of replevin against the plaintiff, Morris, and one Platt, returnable at the July term, to the sheriff of Schenectady, commanding him to replevy 350 tons of bog or iron ore. The ore was delivered by the sheriff to the defendant

¹ *Bonney v. Smith*, 59 N. H. 411.

DeWitt. On the 27th May, the plaintiff, Morris, sued out two writs of replevin against the defendant, one to the sheriff of Schenectady, and the other to the sheriff of Albany, to replevy the same ore, by virtue of which the ore was re-delivered to the plaintiff, part by the sheriff of Schenectady, and part by the sheriff of Albany. A motion was made to set aside the last two writs; in opposition to which affidavits were read, showing title to the property in the plaintiff.

J. V. N. YATES, for the motion.

J. LOVETT, *contra*.

SAVAGE, Ch. J., delivered the opinion of the court.

The law has provided guards against abuses in practice under the writ of replevin. By the Revised Statutes, not only a bond with sufficient sureties must be given, but the plaintiff must make affidavit of his title to the property replevied. The defendant, however, may have the question of property tried before the officer making the replevin; and even after a verdict against him, the plaintiff may still claim deliverance of the property by giving further security. Now, all this is a very useless proceeding, if the defendant in replevin has a right to turn around and bring his action of replevin, and thus regain possession of the property which has been legally taken from him. If such a proceeding were permitted, there would be no end to suits, and the benefit of this action could never be realized. The title to the property in question must be tried upon an issue regularly joined, and, until such trial, the party from whom the property has been taken by due process of law must remain out of possession, unless it is restored to him upon his claim of property.

The plaintiff has given security for the return of the property and payment of damages and costs, if return be adjudged. He has sworn that the property is his; if he has sworn falsely, he may be punished for perjury. The title to the property can not be tried upon affidavit, nor can the defendant in replevin obtain possession of it again but in the mode pointed out by the statute. He may make his claim of property before the

sheriff; if he does not succeed in that, he must await a trial upon the merits. The writs, however, can not be set aside as irregularly issued, for they are not returned, but they may be superseded; and a rule for that purpose is granted, with costs.

KNOWLTON ET AL. V. CULVER ET AL.

(2 Pinney, 243; 1 Chand. 214; 52 Am. Dec. 156. Supreme Court of Wisconsin, 1849).

¹ **No replevin for ore unbroken.** Action of replevin for specific quantity of mineral ore can not be commenced until such mineral has been converted from real into personal property, by being severed from the earth.

Fractions of day will not in general be considered, and the *prima facie* presumption is that the several acts in the course of legal proceeding, when done on the same day, were performed in the order necessary to give them legal effect. But whenever an inquiry into the priority of such acts becomes necessary to protect the rights of parties, the ordinary presumption must give way to the facts of the case.

Bill of exceptions when there is controversy as to weight, effect, or admissibility of evidence, should set forth the evidence given or offered at length, and contain an averment that such evidence was all that was given or offered. When there is no dispute as to the facts, it is sufficient for the bill to state that such facts were proved.

Replevin for a specific quantity of lead ore. The plaintiffs, under the instructions of the court, had a verdict. The further facts appear in the opinion.

J. H. KNOWLTON, for the plaintiffs in error.

CULVER, for the defendants in error.

By the Court, HUBBELL, J.

This is an action of replevin for five thousand pounds of lead ore. There are several allegations of error, of which the third is as follows :

"The court erred in charging the jury that the day could

¹ *Roberts v. Dauphin Bank*, 6 M. R. 54.

not be divided; and that, although the suit was commenced a few hours before the mineral, taken on the writ of replevin, was dug loose or severed from the earth, yet if the jury were satisfied that the said mineral was dug loose during any hour of the said eighth day of February, so as to become personal property, so far as this point was concerned, they (the jury) must find for the plaintiffs, as this was the day laid in the plaintiffs' declaration, which must be the guide; and no fraction of a day could be inquired into for the purpose of showing that the suit was commenced before the mineral was dug loose, upon the same day; that this was not a case in which such an inquiry could be made."

The bill of exceptions contains the following; among other matters: "And upon the trial of that issue, said defendants, to maintain the issue on their part, and to defeat the said plaintiffs, gave in evidence and proved that the mineral taken on the writ of replevin in this suit was dug loose from the earth after three o'clock in the afternoon of the eighth day of February last, and raised to the surface and placed in a pile by eight o'clock in the forenoon of the ninth of the same month; from which place it was replevied about noon of the said ninth. And the said defendants further proved that the said suit was commenced in the forenoon of the said eighth day of February last."

Clearly no cause of action existed until the mineral was converted from real into personal property by being severed from the earth. And this was not done until three o'clock in the afternoon of the eighth day of February. If, therefore, the suit was commenced in the forenoon of the eighth, as the bill of exceptions shows, the suit was brought in point of time before the cause of action arose. This, on general principles, would be a fatal error, and would be good cause for demurrer, special or general, and for reversing the judgment on writ of error: *Lovory v. Lawrence*, 1 Caines, 69; *Bemis v. Faxon*, 4 Mass. 263.

It is alleged, however, that the law recognizes no fractions of a day, and the learned judge in the court below expressly charged the jury that this was not a case in which fractions of a day could be inquired into. In this, I think, he erred. In general it is true that in computing time in respect to the

service of papers, the issuing of process, the calculation of interest, the running of statutes, and many other like matters, the fractions of a day will not be considered. And in reference to the commencement of suits, in particular, it may be admitted that the precise hour or moment of issuing the process or handing it to the sheriff will not, in ordinary cases be inquired into. *Prima facie*, the presumption of law is that the several acts or steps in the course of a legal proceeding take place in the order necessary to give them legal effect. But, whenever an inquiry into the priority of acts, on the same day, becomes necessary in order to protect the rights of parties, the ordinary presumption must give way to the facts of the case: *Pearpoint v. Graham*, 4 Wash. C. C. 232; *Allen v. Stage Co.*, 8 Greenl. 207.

This is not properly dividing a day or taking notice of parts of a day; it is simply taking notice of time and giving effect to particular acts, according to their actual occurrence. The books abound in examples of this sort. The precise times of entering judgments, recording deeds, serving attachments, levying under executions and issuing policies of insurance, are always deemed proper subjects of inquiry when the rights of parties are affected by the priority of the acts.

My attention has been called to the case of *Bidger v. Phinney*, 15 Mass. 259 (8 Am. Dec. 105), as an authority showing that courts will presume acts to have occurred at such hour of the day as may be necessary to give validity to the proceeding, or to effectuate purposes intended. For the prevention of wrong, in extreme cases, such presumptions have been indulged. A similar ruling prevailed in *Clute v. Clute*, 3 Denio, 263. But these cases must be regarded as exceptions to the general rule, *ex debito justitiæ*; and while they sufficiently establish the fact that fractions of a day, or rather points of time, may be the subject of judicial notice, they show that had justice required it the ruling would have been different. In the present case the writ of replevin must have been procured by an affidavit of the plaintiffs setting forth their right to the mineral afterward replevied. But in point of fact the mineral was not severed from the freehold at the time the writ issued. Aside from the practical absurdity involved in the assumption that the affidavit can have been properly made,

there is nothing in the whole case presented to the court which should induce a straining of the rule of law to give validity to the writ.

I have looked into the two other questions raised in the assignment of errors, to wit, whether the mineral taken was the proper subject of replevin, and whether the interest of McCluskin was fatal to the plaintiffs' action; and I find in them no strong ground of justice which varies my views of the point already decided, and as this point is fatal to the plaintiffs' suit, I need not enter upon a discussion of those questions. It was urged in argument that the bill of exceptions was defective in not stating that it contained all the evidence on the points in controversy, or in not setting forth in fact all the testimony given on the trial. The general rule in regard to bills of exceptions is this: where there is no dispute about the facts proved, the bill should state that such facts were proved on the trial; and that is the form of the present bill. In that respect it is correct in form and sufficient in substance, saving the court much trouble and time in examining the details to arrive at the admitted conclusion. Where, however, there is a controversy as to the weight, effect or admissibility of evidence, the bill should set forth the evidence given or offered at length, and should aver that it was all the evidence given or offered at the trial or on the point in question.

On the whole, I am satisfied that there was error in the instructions of the court below, and the judgment must be reversed with costs.

Judgment reversed.

ECKER ET AL. V. MOORE ET AL.

(2 Pinney, 425; 2 Chand. 85. Supreme Court of Wisconsin, 1850.)

Evidence of intent in taking. In an action of replevin for lead ore, evidence as to the intent of the defendant in taking and appropriating the property is immaterial and inadmissible, as his liability does not depend upon the *quo animo* which characterized the taking or conversion.

Evidence of custom relating to discovery. An interrogatory put to a witness as to a prevailing custom in regard to the discovery of lead mineral, is inadmissible, unless the question, or the accompanying statement of counsel, discloses the custom proposed to be proved, so that the court can see its relevancy.

Testimony of party in interest under statute. If upon notice from the plaintiffs served on one of the defendants that they wished to have all the defendants sworn as witnesses on the trial, two of the defendants appear and testify, but the third does not, the plaintiffs have no right under the statute, 1841, p. 26, to be sworn and testify in their own behalf, because the third defendant, not served, does not appear and testify.

Scrambling possession. Two parties can not be in possession of the same lead ore diggings holding adversely to each other, the one rightfully, the other tortiously.

Error to the Circuit Court for La Fayette County.

This was an action of replevin commenced originally before a justice of the peace by the plaintiffs, to reclaim a quantity of lead mineral alleged to have been taken from their possession by the defendants. An appeal was taken in the cause to the circuit court, and on the trial there the defendants obtained a judgment. On the trial at the circuit the counsel for the plaintiffs took several exceptions to the ruling of the court as respects the admission and rejection of evidence offered by the plaintiffs. These exceptions sufficiently appear in the opinion of the court.

A. F. CULVER, for plaintiffs in error.

J. H. KNOWLTON, for defendants in error.

LARRABEE, J.

This was an action of replevin brought by the plaintiffs in error against the defendants in error, to recover the possession of a quantity of lead ore. The cause was commenced before a justice of the peace and came to the Circuit Court of La Fayette County by appeal. A trial was had in that court and a judgment recovered by the defendants. Numerous exceptions were taken to the ruling of the judge before whom the cause was tried, all of which appear in the assignment of errors.

The first error assigned is as follows:

The court erred in not permitting one of the defendants, John S. Moore (who was sworn as a witness under the statute), to answer the following question: "What reason had they for working and carrying away the mineral on Sunday?" This question was asked and objected to, and by the court deemed improper, it is presumed, on the ground of irrelevancy. In order to decide whether the question was relevant to the issue, it is necessary to consider what the plaintiffs were required to prove in order to maintain their action. The action was replevin, and the wrongful act complained of was the taking and carrying away of the mineral spoken of.

The testimony, as stated in the bill of exceptions, showed that the defendants dug the mineral, and that they carried it, or a part of it, away from the place where they had dug it on Sunday. In order to recover, the plaintiffs were obliged to show their right to the immediate possession of the mineral, and the wrongful taking of it by the defendants. I can not see how any answer which the witness could give to the question asked could have had any effect upon the question before the jury. It is said that the witness might have disclosed the fact that the defendants knew they were taking property which did not belong to them, and that the plaintiffs might prove that fact. The authority cited by the plaintiffs' counsel in the argument to this point (2 Stark. Ev. 739) does not support the proposition. In all cases where it is necessary to prove intention, it may of course be proved by any legitimate testimony, but this is not one of the cases. The intention with which the defendants took the mineral had nothing to do with the question before the jury. The plaintiffs might have recovered, although the defendants acted with the utmost good faith, and supposed that they owned the mineral. The question was one of fact, and not of intention, and I can not think that the decision of the court was improper in ruling that the question put to the witness was irrelevant.

The second error assigned is as follows: The court erred in not permitting the witness, Thomas M. Crankshaw, to answer the following question, to wit: "Is there, to your knowledge, any established rule or custom of the mines in the vicinity, in relation to the rights acquired by a person making a lead ore discovery upon the land of another? If so, what is that rule?"

There clearly was no error in ruling the question put to the witness to be improper. He was asked if there was a rule, and if there was one, what it was. The court could not see that the question propounded to the witness had any relation to the one before the jury. The question put to the witness should have had some apparent connection with the case on trial, or have been accompanied by a statement of counsel showing its connection. If the plaintiffs intended to rely upon a custom to show their right to the mineral in dispute, they should have shown what the custom was which they intended to prove, in order to enable the court to judge of the propriety of admitting proof to establish it.

The third error assigned is as follows: The court erred in refusing to allow the said witness, Thomas M. Crankshaw, to answer the following question, to wit: "Has Mr. McCoskey, to your knowledge, any rule in relation to such rights upon this particular lot?" It is manifest that this question is obnoxious to the same objections which apply to the preceding one. It relates to the rule, if any, which McCoskey had in relation to the rights of those who dug mineral upon his land. The rule which the owner of the land had in relation to those who dug mineral upon his premises, might or might not have affected the relative rights of those who dug the mineral. The question was general, and had no apparent connection with the case. The court could not see that it had any relation to the question before the jury.

The fourth error assigned is as follows, to wit: The court erred in not permitting the following question to be put to the witness: "Do you or do you not know any rule of the mines or custom of the country making a north and south range a dividing line between contending claimants to the same range? Speak of your own knowledge." This question differs from the others, by which the plaintiffs sought to obtain proof of a custom, in this, that it is specific. The court could tell what the custom was which was sought to be proved, and thus judge of the propriety of admitting evidence to establish it. But I can not see that the ruling of the court, by which it was excluded, was improper. There is nothing in the case which makes the testimony relevant. It could not have benefited the plaintiffs to prove such a custom,

because they could not found any right upon it. The statement of the evidence, contained in the bill of exceptions, shows that the plaintiffs were at work upon an east and west range of mineral on land belonging to one McCoskey. To show their right to recover, the plaintiffs introduced evidence tending to prove that the defendants dug the mineral in dispute on the same range. It further appears, from the bill of exceptions, that between the places where the parties were thus digging there was a north and south range crossing the east and west range. The testimony shows further, that the plaintiffs were digging west of this north and south range and the defendants east of it, and that the mineral in question was dug by the defendants at the place where they were thus digging, east of the range. Now, it could not have availed the plaintiffs to prove that there was a custom making a north and south range the dividing line between contending claimants thus situated, because the defendants obtained the mineral in dispute east of the range, while the plaintiffs were at work to the west of it. Nor could the plaintiffs be permitted to prove that there was no such custom, because the defendants did not rely upon it and had introduced no testimony tending to establish it. The bill of exceptions shows that testimony had been introduced tending to prove that the parties had *agreed* to make the north and south range the dividing line between their respective claims, but it does not appear that any testimony whatever had been introduced upon the subject of the custom. The testimony was therefore properly rejected.

The fifth error assigned is as follows, to wit: The court erred in not permitting the plaintiffs to be sworn as witnesses. The bill of exceptions shows that the plaintiffs served a notice on one of the defendants (Moore) that they wished to have all the defendants sworn as witnesses on the trial. The notice was filed with the clerk, among the papers of the case, on the 17th of April, 1848. It was not served personally on either of the defendants, except Moore, nor on their attorney. At the trial Moore and Crankshaw appeared and testified, being called by the plaintiffs' counsel, but Joslin was not present. His failure to appear and testify or to produce his deposition, taken in pursuance of the statute, the plaintiffs contend,

gave them the right to testify. The statute gives either party the right to notify the adverse party that he wishes to have him sworn as a witness, and unless the party notified appears and testifies at the trial, or produces his deposition (which under certain circumstances he is allowed to do), the party giving the notice can himself be sworn as a witness: Stat. 1841 p. 26. I do not think that the service of the notice was sufficient. There was no service on the attorney of the defendants, nor on either of the defendants personally, except Moore. He appeared and testified, and Crankshaw also, who was not served with notice. It does not appear where Joslin, the other defendant, was; all that the court can know is, that he was not present at the trial. But, whether the notice was sufficient or not, it is clearly wrong for the plaintiffs to avail themselves of the testimony of two of the defendants, and then, because the remaining one did not appear, to have the right to testify themselves. The statute contemplates that the party giving the notice shall have the right to testify, only when the party notified fails to appear; that only one party should testify. If the defendant Joslin had been present and had refused to be sworn, or if he had absented himself after having appeared at the trial, the plaintiffs might perhaps have moved to strike out the testimony of Moore and Crankshaw, the defendants who had testified, and then have offered themselves as witnesses; or they might have called upon all the defendants to be sworn in the first instance, and if they did not all appear they could have insisted on their rights under the statute. But in this case the plaintiffs called upon Moore and Crankshaw, who appeared and testified, and after their testimony had been received, Joslin was called. I think that the decision of the circuit court was correct.

The sixth error assigned is as follows, to wit: The court erred in instructing the jury that there was no such thing as two persons being in possession of the same premises, holding adversely, the one rightfully, the other tortiously.

There can, I think, be no doubt of the correctness of the ruling of the circuit court upon this question. The nature of adverse possession was settled by this court in the case of *Whitney v. Powell*, 2 Pinney, 115; but whether the ruling was right or wrong, the question involved does not appear to have had any connection with the case.

The seventh error assigned is as follows, to wit: The court erred in instructing the jury that a person, having the right of working out a range of mineral, could not maintain replevin for lead ore dug and taken therefrom by another party holding adversely; that if the jury believed, from the evidence, that the plaintiffs had merely the exclusive right to dig the lead ore contained in said range, they could not find for the plaintiffs.

This assignment of error brings before the court a very important question, and that is, whether a person going upon the land of another, with his consent, to dig lead ore, and agreeing to give a certain portion of the ore which he may find as rent to the owner of the land, and commences working upon a lead or range of mineral, can maintain this action for ore wrongfully dug at another place on the same land and in the same range of mineral. This point was not fully argued, and it being understood to be a very important question in the western part of the State, where contracts for mining are very often made, the court have concluded to give no opinion upon it, as no decision of it is necessary for the purpose of disposing of this case; for we are all of opinion that the evidence, as stated in the bill of exceptions, shows that the plaintiffs gave the defendants permission to dig the mineral in question. This obviates the necessity of deciding whether the instructions given to the jury upon this point were correct or not.

The eighth assignment of error is as follows, to wit: The court erred in instructing the jury that it had heard no evidence that the plaintiffs had a lease of the premises from which the lead ore in dispute was raised.

This instruction clearly was not erroneous. There was no testimony in the case tending to show a lease of the land to the plaintiffs, except occupancy. If occupancy of the land by the plaintiffs, for the purpose of digging the ore upon it, tends to prove a lease from the owner, McCoskey, it could not extend to land not so occupied; and the testimony shows that the mineral in dispute was dug by the defendants on land occupied by them. Upon the whole, we are of opinion that the judgment should be affirmed.

Judgment affirmed.

GREEN ET AL. V. THE ASHLAND IRON CO.

(62 Pennsylvania State, 97. Supreme Court, 1869.)

¹ **Title to land can not be tried**, but may incidentally arise and be heard in a transitory action.

The mere assertion of title is nothing if the title be not in fact in controversy; but when it appears that there is necessitated a trial of title to land in order to determine the right to the chattel, replevin will not lie.

Ore, to which soil adheres, may be replevied. In an action of replevin for ore raised from a mine by the plaintiffs, the fact that the ore was unwashed, and was mixed with earth, would not affect the plaintiff's right of action.

Retroactive statute, removing disability of person. A foreign corporation, prohibited from holding real estate in Pennsylvania, brought an action of replevin for ore taken out by them under a mining lease; subsequently an act was passed allowing them to sue, and providing that any pending suit should be treated as brought under such act: *Held*, that the action could be maintained.

Inability to recover, distinguished from incapacity to maintain suit.

Error to the Court of Common Pleas of Adams County.

To August term, 1866, of the Court of Common Pleas of Adams County. The Ashland Iron Company of Baltimore County brought an action of replevin against John Green and John Vanhyning and Enoch Lefever for 450 tons of unwashed iron ore, of the value of \$1,000. Green and Vanhyning claimed property, and gave bond to the sheriff; Lefever pleaded "Non cepit," Green and Vanhyning pleaded "Property." On the trial, August 18, 1868, before Fisher, P. J., the plaintiffs gave evidence of their incorporation March 15, 1853, by the Circuit Court of Baltimore County, Maryland; also their incorporation February 13, 1867, with increased powers by the legislature of Maryland; also, act of April 10, 1867, Pamph. L. 1088, authorizing the plaintiff-

¹ *Renick v. Boyd*, 99 Pa. St. 555; 44 Am. R. 124; *Smith v. Cunningham*, 7 Pac. 679.

iffs "to purchase, hold and dispose of property, real, personal and mixed, in fee simple or leasehold, in York county or its adjoining counties, etc.; also, act of April 14, 1868, Pamph. L. 1068, which made the plaintiff capable of suing and being sued in any of the courts of this Commonwealth, and provides "that any action instituted prior to the passage of this act, to which said company is a party and which is still pending, shall be treated as instituted under the provisions of this act." They further gave in evidence the following:

"MEMORANDUM OF AGREEMENT.

"3,000 tons first year.

"4,000 tons per year during the time the Ashland Co. keep the lease. No other person or persons to raise ore at said bank during the lease. To pay the rent quarterly for all mined from bank. Should anthracite iron rise to average price of \$28, the rent to be 50 cents. Ashland Co. to pay 45 cents per ton from this time until average price of iron is \$28 per ton. Ashland Co. agree to put on cars 12,000 feet hemlock 3-in. stuff at Wrightsville or Goldsboro'. The rent to commence 1st of April next.

"Signed Feb. 3, 1859.

RICHARD GREEN, Agt.
ENOCH LEFEVER."

Green was manager of the plaintiffs and authorized to make the agreement.

The plaintiffs gave evidence of the mining of ore commencing in the spring of 1859, which was hauled out and remained on the bank; it had to be washed or screened before it was fit to be used or shipped. The screening is to separate it from the dirt; it can not always be screened when hauled out, being too wet; screened ore is as good as any. The mining continued until January, 1865, when Lefever requested the miners to stop, as he had sold the bank, and said he had reserved the ore; he gave the plaintiff until September 1, 1865, to remove it. A miner informed Lefever that plaintiffs wanted the ore, and would wash it as soon as water could be got. Plaintiffs' hands continued to wash the ore till stopped by the cold weather in December. They commenced moving the unwashed ore July 1, 1866, and were stopped by an action of trespass July 27th. He gave evidence, also, that in De-

cember, 1865, Green, one of the defendants, informed plaintiffs' hands that they would give them notice when they, the defendants, wanted the ore moved.

On cross-examination a witness of plaintiffs, one of their own hands, stated that there was time to remove the ore before September, 1865, if they had sufficient hands and plenty of water; that Lefever requested him frequently to go on and wash the ore. There was no interference by defendants until July, 1866.

Plaintiffs gave in evidence letters between their agent, J. C. Clarke, and Lefever. One dated January 1, 1866, from Clarke, saying: * * * "I directed Mr. Warfield to haul away the washed ore from the machine, then turn it around so as to be out of the way of Mr. Green. As soon as the weather will permit I will send up our carpenter to move everything out of the way. As soon as we get our machine up we will wash out the screen ore. Hope this will be satisfactory. We do not give up our right to enter into the bank and take away therefrom the ore raised by us."

Lefever's answer, dated January 4, 1866: "I received your letter of the first, and it was all satisfactory to me, except the last sentence. * * Do you mean only to claim the ores that your men have already raised, or do you mean to say that you have the privilege of mining on my farm hereafter? * * It is just and important for me to know. All the ore that your men raised prior to this date, I am willing you shall have."

Clarke's reply, January 9, 1866: "Your favor of 4th, duly to hand. In reply will say, we only claim the right to go upon, clean up and take the ore away which the Ash. Iron Co. has raised, all of which we hope to do before a great while. We do not claim the right to continue to raise ore upon your land, only to remove that we have raised. My letter of the 1st was only intended to convey the same claim as now stated."

There was evidence that the defendants were in possession of the premises and were working at the bank in the spring and summer of 1866, and Lefever in the presence of Clarke, the plaintiffs' manager, recognized the defendants' right to the possession. There was no evidence against Lefever. The plaintiffs having closed, the defendants offered in evidence an

unstamped lease of the ore bank to themselves, to commence April 1, 1866, which on objection by the plaintiffs was rejected by the court.

The plaintiffs submitted these points:

"3. The agreement between the Ashland Iron Company and Lefever, being a lease from year to year, commenced with 1st of April, 1859, and had no definite termination; it could be terminated only by either party giving to the other legal notice to terminate it, three months prior to the commencement of the succeeding year. If the jury find that no notice was given to the Ashland Iron Company prior to the 1st of January, 1865, to terminate the lease on the 1st of April, 1865, the company held over for another year from April 1, 1865, and if no legal notice was given to the Ashland Iron Company prior to January 1, 1866, to terminate the lease on the 1st of April, 1866, the Ashland Iron Company was in legal possession of the ore at the time of the service of the writs of trespass and replevin, and is entitled to recover the value of the ore mined by them there at that time."

Answer: "The proposition of law, as stated in this point, is correct, unless the plaintiffs had abandoned their lease. Whether they had or had not, is for the jury to determine from the evidence."

"4. Under the terms of the lease, the Ashland company were entitled to legal notice to terminate the tenancy, and there is no evidence that any such notice was ever communicated to the said company."

Answer: "This is correct. Whether the Ashland Iron Company had legal notice, is for the jury to determine from the evidence, subject to the direction of the court as to what constitutes legal notice." * * *

"6. The ore mined by the Ashland Iron Company is personal property, and does not pass to Green & Vanhyning under any lease made with them; they have no legal claim to it, and Lefever having disclaimed property in it, the plaintiff is entitled to recover the value of the ore."

Answer: "The ore mined by the Ashland Iron Company, under the provisions of the lease of February 3, 1859, is personal property, and does not pass to Green & Vanhyning under any lease made by them, unless specially transferred to them by the party having property in it."

The defendants submitted these points :

"4. The Ashland Company, under their agreement, had power to mine and take away ore, but had no right to remove the soil mixed with ore, and can not maintain this action of replevin against the parties in possession for refusing to permit them to remove the unwashed ore, or for converting it to their own use."

Answer : "The facts stated in this point, if correct and in accordance with the facts proved in the case, will not prevent a recovery by the plaintiffs, if otherwise entitled to recover."

"5. The plaintiffs were a foreign corporation, having no legal existence in this State at the time this suit was instituted, and therefore can not recover."

Answer : "The court reserve this point, and direct the jury, if they find for the plaintiffs, to find subject to the opinion of the court, whether the plaintiffs can maintain an action in this Commonwealth."

The court, after referring to the evidence, etc., charged:

* * *

["It is contended that replevin will not lie for unwashed ore; but we think differently. If the plaintiffs mined it under their lease, they had a qualified property in the earth that surrounded it—the right to retain it for the purpose of washing out the ore, if they have not forfeited it.] * * *

"It is contended, whatever may be the facts in relation to the notice to terminate the lease, that Mr. Lefever, before he leased to Green & Vanhynning, gave the Ashland company time to remove the ore until the first of September following. If he did, the Ashland company had the right to remove it until that time expired.

"It is also contended that after Green & Vanhynning made an arrangement with Lefever to mine the banks, one of the members of the firm gave the Ashland company time to remove the unwashed ore. If such an arrangement was made, the plaintiffs ought to have had a reasonable time given them to enter and remove the ore mined by them, before the defendants could remove it or use it themselves. If the defendants, Green & Vanhynning, or either of them, made such an arrangement with the Ashland company, and did not allow a reasonable time to the Ashland company to remove it, but removed

it or used it themselves before the expiration of a reasonable time, they are liable to respond in damages to the plaintiffs for the value of any of the unwashed ore left by plaintiffs on the banks of the mine and used by the defendants. * * * What would be a reasonable time, the jury will determine from the circumstances of the case."

The verdict was for the plaintiffs against Green & Vanhynning for \$670.25, and in favor of Lefever.

Green & Vanhynning removed the case to the Supreme Court, and assigned for error the part of the charge inclosed in brackets and the answers to the points.

R. G. McCREARY, for plaintiffs in error.

D. WILLS, for defendants in error.

The opinion of the court was delivered by AGNEW, J.

It is undoubtedly true that the title to land can not be tried and adjudicated in a transitory action: *Mather v. Trinity Church*, 3 S. & R. 509; *Baker v. Howell*, 6 S. & R. 476; *Brown v. Caldwell*, 10 S. & R. 114; *Powell v. Smith*, 2 Watts, 126. But it is equally well settled that the title may incidentally arise and be heard in such an action: *Wright v. Guier*, 9 Watts, 173; *Elliott v. Powell*, 10 Id. 454; *Harlan v. Harlan*, 3 Harris, 509; *Clement v. Wright*, 4 Wright, 250; *Brewer v. Fleming*, 1 P. F. Smith, 102. As remarked by Judge Rogers in *Harlan v. Harlan*, p. 515, the mere assertion of title is nothing; the court looks to the substance, and when it appears in truth it is a trial of the title, then it is properly ruled that replevin is not the proper action. While it is true (Judge Strong remarks in *Clement v. Wright*, p. 254) that in actions of replevin or trover the title to real property can not be directly tried and adjudicated upon, it is equally true that it may be incidentally brought into question, and may therefore be admitted in evidence. It is quite evident in this case that the title to the real estate on which the ore was mined was not in controversy. The ore in question was mined by the plaintiffs while in possession under an admitted lease. Lefever, the landlord, admitted their title to the ore,

disclaimed, and rested his defense on the plea of *non cepit*. Green & Vanhyning, the subsequent lessees, laid no claim to the ore as mined by themselves or under their lease, and there was proof of Green's permission, as well as Lefever's, to the plaintiffs to remove the ore after the expiration of their lease. It is true they set up a claim to the ore under Lefever as a right accompanying his demise to them, but it was a claim to it as mined or severed ore, and not as a part of the realty attached to the freehold. The real claim of the defendants, evidently, was under a sale of the ore to them by Lefever, ore which they knew the plaintiffs had mined. The ground on which this claim is based is not very clear, whether on an independent sale or as an incident to the lease. In fact, however, the defendants showed no lease, the paper being unstamped and excluded by the court, and the controversy resulted in the question upon the plaintiffs' title, and their right to remove the ore after the expiration of their lease, and the right to maintain any action at all. The true question, therefore, was upon the title of the plaintiffs to the ore as a chattel, and not upon the title to the mines from which it had been severed. Under these circumstances we perceive no error in holding that replevin would lie, and in ruling that the right to recover the unwashed ore was not affected by its being mixed with portions of earth that clung to it. It appears from the testimony that ore is often wet, and in mining some dirt will cling to it which must be washed away, and therefore that it is thrown out into piles to dry. This being the course of business in mining iron ore recognized by Lefever, the landlord, who laid no claim to retain the earth remaining in contact with the ore, it would be a technicality much too refined to hold that replevin for the ore thus mined and thrown out will not lie.

There is an obvious distinction between a disability of *person* which prevents a party from maintaining an action, and a defect of title which prevents his recovery. The point put by the defendants was that the plaintiffs were a foreign corporation having no legal existence in this State at the time this suit was instituted, and therefore could not recover. This was evidently a prayer for instructions founded on the disability of the person of the plaintiffs, and not because of an

inability to acquire title to the thing in suit. The defendants asked no instructions on the latter, and, on the contrary, in their 4th point, asked the court to say that the plaintiffs, under their agreement with Lefever of February 3, 1859, *had power to mine and take away ore*, but had no right to remove the soil mixed with the ore, etc. The question was therefore not made to the court how far the plaintiffs were unable to obtain title to the ore, because of the invalidity of the lease under the 5th section of the act of 26th April, 1855, prohibiting foreign corporations from holding lands in this State without a special authority of law. Under the authority of *Stewart v. U. S. Ins. Co.*, 9 Watts, 126, and the validating act of April 14, 1868, Pamph. L. 1068, the court held that the action could be maintained notwithstanding the plaintiff's foreign character. In this there was no error, and we will not reverse on a point not made in the court below.

The answers of the court as to the notice required to terminate the lease, which was indefinite in its duration, did the defendants no harm. Both parties called upon the court for instructions on this point, and they can not complain that the court therefore stated the necessity of the notice to end the lease. But the court submitted the case to the jury on the fact of the abandonment of the possession by the plaintiffs and the entry of the defendants into possession, and the question whether Green had given leave to the plaintiffs to return and remove the ore. The case was fairly submitted on its facts, and we perceive no error, therefore, in the answers as to the notice to quit.

Judgment affirmed.

INDEX.

ABANDONMENT.

1. *Effect of lapse of time.*—When the property of one man is left upon the premises of another for any length of time, by sufferance, without claim by the owner of the soil, the mere lapse of time does not divest the title; nor, if abandoned by the owner, would the chattel necessarily revert to the owner of the freehold. *Noble v. Sylvester*, 62

2. *General belief as evidence of abandonment.*—Upon the question of good faith in making an entry upon plaintiffs' mining claim, for the purpose of re-locating it: *Held*, that the court properly sustained an objection to the following question: "Do you know what the *general belief* was in reference to those mines, as to whether they were abandoned or not?" *Phenix Mill v. Lawrence*, 262

3. *Abandonment after action brought—Findings.*—In an action to quiet title to a mining claim, if a supplemental answer sets up an abandonment of the claim by plaintiffs since suit commenced, but fails to allege any subsequently acquired rights in defendant, such matters, if true, will not avail as a defense; and the failure of the court to make a special finding of fact thereon is immaterial. *Pralus v. Pacific Co.*, 478

See FORFEITURE; PROSPECTING CONT., 18, 26.

ACCOUNT.

1. *Accounting—Fraud not considered.*—The fraudulent procuring of an injunction is not a matter which can be considered upon accounting between tenants in common. *Hall v. Fisher*, 88

2. *Proceeds applied, treated as payments.*—Where a party entitled to but a half interest in the mine puts back into the mine the entire proceeds, it is the equivalent of his partner paying his half of the expenses. *Sears v. Collins*, 400

See PROSPECTING CONTRACT, 17.

ACT OF GOD.

1. *Coal contract impliedly based on transportation facilities.*—A coal company under its charter constructed a railroad to connect with Lehigh navigation, which thus notoriously became indispensable for the transportation of its coal. All contracts with the coal company were made in view of these facts. The coal company contracted with plaintiffs for the delivery of a large quantity of coal during the season. Before the time for delivery of a large part of the coal, a flood swept away all the works of the navigation company, so that the coal company were prevented from fulfilling their contract. *Held*, that they were excused from compliance while they were so prevented. *Lovering v. Buck Mt. Co.*, 535

ACT OF GOD. *Continued.*

2. *Idem.*—The coal company would be relieved from exact compliance by an act of God, over which they could have no control, and which they, not being the owners of the navigation works, could not have provided against. *Id.*

ADMISSIONS.

1. *Admissions of president acting as viewer.*—In a former trial and between other parties, the president of the corporation, defendant, was selected by his company to go with the jury to examine the premises. *Held*, that his declaration made at the time as to the company not claiming a certain part of the ledge was relevant in a subsequent suit by a party claiming the ground referred to by the president of the company. *Green v. Ophir Co.*, 140
 2. *The exclusion of an admission* not shown affirmatively to have been relevant will not be considered error. *English v. Johnson*, 203
 3. *A defendant's admission of a fact is not conclusive* upon him, but it is to be weighed by the jury in connection with all other evidence in the case. *Murley v. Ennis*, 360
- See POSSESSION, 3.

ADVERSE CLAIM.

1. *Acts of possession subsequent to filing.*—The rights of claimants of mining ground as to which application for United States patent has been made, can not be determined by acts subsequent to the filing of the adverse claim. *Moxon v. Wilkinson*, 602

ADVERSE POSSESSION—See STAT. LIMITATIONS.

AGENT—See LOCATION, 8, 9; PROCESS, 1, 2; PROSPECTING CONTRACT, 2, 3.

AGRICULTURAL LAND.

1. *Hotel and town lots on mining ground.*—The acts giving the right to mine upon land appropriated for grazing and agricultural purposes, do not apply to the case of a town lot occupied for hotel purposes. Lands settled in good faith and built up as mining towns, must be protected as incidental to the business of mining. *Fitzgerald v. Urton*, 198
2. *Entry by miner upon agricultural land held adversely.*—Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing, 1st, that the land is public land; 2d, that it contains mines or minerals; 3d, that he enters for the *bona fide* purpose of mining. And such justification must be affirmatively pleaded in the answer, with all the requisite averments to show a right under the statute, or by law to enter. *Lentz v. Victor*, 211
3. *Prior agricultural claim.*—The right of miners by a later appropriation can not be exercised to the damage of the ranch or ditch of an agricultural settler lying below. *Levaroni v. Miller*, 232

AMENDMENT.

1. *Bill in equity amended after trial.*—Upon a bill in equity to enforce the personal liability of the officers of the corporation, upon company drafts accepted by the plaintiff for the accommodation of the company

AMENDMENT. *Continued.*

and paid by him at maturity, the plaintiff, after the trial, moved to amend so as to include in his pleadings a draft not therein mentioned. *Held*, that as the case had been tried as if the allegation offered by way of amendment had been contained in the original bill, the motion would be allowed. *Byers v. Franklin Co.*, 27

2. *Amendment after case submitted—New testimony.*—An amendment by striking out a portion of the complaint, after the case has been submitted to the court, will not entitle the defendant to introduce more testimony if the amendment has in no respect changed the issues. *Ahrens v. Adler*, 114

3. *Refusal to allow amended answer.*—It is no abuse of legal discretion in the court to refuse to allow defendant to file a second amended answer, the affidavit not showing what the defense is nor why it was not interposed before. *First Nat. Bank v. How*, 134

4. *Amendment by changing form of action.*—The plaintiff sued for the price of a share of oil stock which he had purchased of defendant, and declared in assumpsit for money had and received. At the trial he was nonsuited, but was afterward allowed to amend his declaration and declare in tort for deceit. *Held*, that the circumstances showing that by fraudulent imposition the defendant had obtained money which he ought to return, either assumpsit or tort might be supported, and there was no error in allowing the amendment. *Smith v. Bellows*, 157

5. *Rehearing after bill amended.*—The extent to which a rehearing shall be allowed after a bill is amended is a matter resting wholly in the discretion of the trial court. *Hoyt v. Smith*, 325

6. *Amendment after verdict.*—It is no abuse of discretion for the court to refuse to allow an amendment to the answer after facts had been submitted to and the findings made by the jury. *Sears v. Collins*, 400

See PROSPECTING CONTRACT, 12; STATUTE OF LIMITATIONS, 2.

ANNUAL LABOR—See RE-LOCATION, 2.

APPEAL.

1. *No review of orders not in judgment roll.*—The ruling of the court in striking out a portion of the answer can not be reviewed upon appeal, if not made a part of the bill of exceptions or included in the statement, since it forms no part of the judgment roll. *Feeley v. Shirley*, 132

2. *Practice on appeal.*—When the trial is to the court, the finding will not be disturbed unless manifestly against the weight of evidence. *Dickson v. Moffat*, 666

APPURTENANCES.

1. *Omission of "appurtenances."*—Enumeration of incidents of real property which pass without the word "appurtenances." *Wright v. Chestnut Co.*, 528

See RAILROADS, 2.

ASSIGNMENT.

1. *Assignment.*—A right of action growing out of fraud by the defendants is assignable. *Woodbury v. Deloss*, 144

ASSIGNMENT. *Continued.*

2. *Right to damages does not pass by assignment of lease.*—The tenant under the terms of such a lease does not part with his right to damages for the breach of covenant on the part of the railroad, because he had sold "all of his right, title and interest" in the colliery. *Mine Hill Co. v. Lippincott*, 555
See VENDOR'S LIEN, 1.

ASSUMPSIT.

1. *Assumpsit—Title to realty disputed.*—Assumpsit for money had and received will not lie for the price of sand taken and sold from a sand bar to which both plaintiff and defendant claim title. *Baker v. Howell*, 73

BARRIERS.

1. *Case for removing barriers; declaration looking to consequential damages upheld.*—A declaration stated that plaintiffs and defendants were owners of adjacent mines; that defendants had trespassed on plaintiffs' mine and had carried away a quantity of coal; that water had arisen, against which, but for the trespass of the plaintiffs, the coal would have been a sufficient barrier; that thereupon it became and was the duty of the defendants to prevent the water in their mine from flowing into the plaintiffs' mine; yet the defendants neglected their said duty, whereby the water flowed into the plaintiffs' mine and prevented them from working the same. *Held*, on general demurrer, a good count in case. *Firmstone v. Wheeley*, 76
See RAILROADS, 11.

BILLS AND NOTES.

1. *Contract of indemnity for accepting drafts—Defense.*—In an action against the officers of the corporation by one who has accepted and paid drafts under a contract that the corporation would indemnify him, it is no defense that the drafts were not those of the corporation but of one Cook, its treasurer. *Byers v. Franklin Co.*, 28
2. *Defense to note payable out of mine.*—Bast sued Anspach on a note at six months; in his affidavit of defense, Anspach averred that he had bought a colliery from Bast, to pay thirty cents a ton for coal mined until all the purchase money was paid, Anspach to work the mine "diligently and constantly;" that he gave the note in settlement of the purchase money, with an agreement that it was to be renewed, if enough coal had not been got out under the agreement to pay it at maturity, etc. *Held*, that the affidavit, if otherwise sufficient, was insufficient for not averring that the mines had been "diligently and constantly worked." *Anspach v. Bast*, 110
3. *Cotemporaneous parol promise to renew note.*—Parol evidence of an agreement when the note was made, that it should be renewed at maturity, would contradict the written contract of the parties, and was therefore inadmissible. *Id.*
4. *Note payable on sale of mine.*—A cotemporaneous agreement in writing executed by the payee of a promissory note, making the payment conditional upon the sale of certain mines, is admissible in evidence

BILLS AND NOTES. *Continued.*

under the general issue in an action on the note by an indorsee after maturity, against the maker. *Munro v. King*, 160

See CONSIDERATION, 2; CORPORATIONS, 1; FRAUD, 9; PERSONAL LIABILITY, 2.

BOUNDARIES.

1. *Infant consenting to boundaries.*—If consentable lines are fairly made between adjoining tracts by a guardian on behalf of an infant and an adult, the latter, or those claiming under him, can not object on the ground of the infancy; and it seems that if the infant do not dissent when he comes of age, but acquiesces, he is forever bound. *Brown v. Caldwell*, 674

See LOCATION, 5; POSSESSION, 2, 21.

CLAIM.

1. *No presumption of uniformity in size of claims.*—In the absence of mining regulations, the fact that a party has located a claim bounded by another, raises no implication that the last located claim corresponds in size, or in the direction of its lines, with the former. *Live Yankee Co. v. Oregon Co.*, 94

2. *Mining claims are treated as real estate* although the title be held under conditions, and as such, are conveyed by deed, are sold on execution, and descend to the heir. *Harris v. Equator Co.*, 178

3. *Vested rights of mining claimants.*—Persons claiming and in the possession of, mining claims upon the public lands of the United States, are as between themselves, and all other persons except the United States, owners of the same, having a vested right of property founded on their possession and appropriation. *Hughes v. Derlin*, 241

COAL—See LAND, 1.

COLLIERY—See RAILROADS, 4; RENTS AND ROYALTIES, 5; SURFACE SUPPORT, 1.

COMMON CARRIER—See ACT OF GOD.

CONSIDERATION.

1. *Fraud that impeaches the consideration* of a promissory note constitutes a defense to an action at law on the note. *First Nat. Bank v. How*, 134

2. *Failure or want of consideration* must be specially pleaded in an action on a promissory note. *Munro v. King*, 160

3. *Consideration in prospecting lease—Warranty.*—Under a prospecting lease wherein the lessee agrees to pay a royalty or a fixed sum to be allowed as advance royalty, there is no implied warranty that the coal sought for when found shall be "good, marketable, merchantable coal." The consideration will be applied as for the use of the land. *Fort Scott Co. v. Sweeney*, 166

See FRAUD, 5; RENTS AND ROYALTIES, 4, 6.

CONSTITUTION.

1. *Declaratory laws, as such, are unconstitutional.*—They may operate as future rules on subsequent transactions; but, as constructions of
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CONSTITUTION. *Continued.*

prior law, they are utterly void. The State Legislature has no power to construe a statute previously enacted—such construction, as to acts done, is solely for the judiciary. *Union Iron Co. v. Pierce*, 20

CONTINUANCE:

1. *Affidavit for continuance used upon trial.*—An affidavit for continuance is not to be treated by the court as a part of the record, and can only be used upon the trial, if at all, when introduced by one of the parties for some legitimate purpose. *Campbell v. Rankin*, 257

CONTRACT.

1. *Rule of construction.*—In interpreting agreements it is an elementary rule to construe the clauses together, giving to each the sense which results from the whole instrument. *Escoubas v. Louisiana Co.*, 343

2. *In mora.*—Parties are put *in mora* by a demand that they do that which in a legal sense they ought to do, and can do. *Id.*

See ACT OF GOD.

CORPORATIONS.

1. *Power of corporation to make note.*—A corporation (mining) may make a promissory note for a debt contracted in the course of its legitimate business, although not specially authorized by its charter to contract in that form. *Moss v. Oakley*, 1

2. *The incorporation laws a part of the charter—Implied notice of liability.*—The general act under which a company becomes incorporate and its articles of incorporation, taken together, constitute the charter of incorporation, the acceptance of which charges the corporation with knowledge of all the duties prescribed by the act, and of all consequent liabilities. *Van Etten v. Eaton*, 12

3. *Corporate meetings—How called.*—When the by-laws provide that meetings of stockholders shall be called by the board of trustees, a meeting called by the president of the company is illegal. *State v. Pettineli*, 513

See PERSONAL LIABILITY; QUO WARRANTO; RAILROADS, 12; STOCK.

COSTS.

1. *Taxing costs in actions for diversion of water.*—In actions for the wrongful diversion of water, the Practice Act of Nevada fully authorizes the taxing of the costs against the party who is in the wrong, irrespective of the amount of damages recovered. *Brown v. Ashley*, 163

2. *Costs, in equity*, are discretionary, and ought to be left to the action of the trial court. *Hoyt v. Smith*, 326

CONVEYANCE—See DESCRIPTION 1; PATENT. !

DAM.

1. *Duties of dam owner.*—The owner of a dam is bound to see to his own property, and to so govern and control it that injury may not result to his neighbors. *Fraser v. Sears Co.*, 98

DEBT.

1. *Debt will lie upon a penal statute.*—It lies whenever the obligation is to pay a sum certain, or which may be readily rendered certain, whether

the liability arises on simple contract, legal liability, specialty, record or statute. *Union Iron Co. v. Pierce*, 19

DEFAULT.

1. *Damages not being prayed for can not be assessed on default.*—In an action to recover a tract of coal land, and for an injunction, not praying damages, damages can not be assessed against defendants in default, although the complaint states facts sufficient to sustain a judgment for damages. *Pittsburgh Co. v. Greenwood*, 123

DEMAND.

1. *The distinction between a modus and a suspensive potestative condition* is that the former is obligatory, and if the party bound is passively violating his obligation, he must be put in default before an action will lie. In the latter, its accomplishment depends upon personal choice; the party on whom it is imposed is free to accomplish it or not, and to put him in default would be a vain thing, since it would be to demand that he do what he is under no obligation to do. *Escoubas v. Louisiana Co.*, 343

See CONTRACT, 2.

DEPOSITIONS.

1. *Depositions in narrative form.*—An objection to a deposition under the California statute, that it is taken in narrative form, instead of question and answer, will not be sustained. *Pralus v. Pacific Co.*, 478

2. *Single certificate to depositions of several witnesses.*—When the depositions of two or more witnesses are taken in behalf of the same party, under the same notice, at the same time and place, and before the same officer, a single certificate appended at the close of all the depositions on the same paper, or on several sheets securely attached together, if in proper form, may cover each and all. *Id.*

DESCRIPTION.

1. *Description of bar claims.*—Description of bar placer claims, giving name of claim and adjoining claim, size and location in canyon. *Held*, sufficient. *Grady v. Early*, 104

DISCOVERY.

1. *Evidence of custom relating to discovery.*—An interrogatory put to a witness as to a prevailing custom in regard to the discovery of lead mineral, is inadmissible, unless the question or the accompanying statement of counsel discloses the custom proposed to be proved, so that the court can see its relevancy. *Ecker v. Moore*, 636

DISTRICT RULES.

1. *Book of district rules as evidence.*—The defendants having in court a book containing the mining rules of the district, offered in evidence an extract therefrom. *Held*, that the court properly ruled that the evidence should be excluded unless the rules were offered as a whole. *English v. Johnson*, 203

2. *Local records as evidence.*—While the record of a mining district is the best evidence of the rules and customs governing its mining inter-

DISTRICT RULES. *Continued.*

ests, it is not the best or only evidence of the priority or extent of a party's actual possession. *Campbell v. Rankin*, 257

3. *District rules* may be shown to be in force by custom or usage, without proof of their adoption at a miners' meeting, or a written record thereof. *Flaherty v. Gwinn*, 605

4. *District rule must bind all*.—Where there is a local usage requiring a record of claims to be made, whether by resolution passed at a miners' meeting or otherwise, proved to be in force, it is obligatory upon all, and not optional. *Id.*

5. *Must be specific*.—District rules imposing conditions upon miners in addition to those imposed by the statutes of the United States, must be clear and positive in their character, not resting upon inference or presumption. *Id.*

See EJECTMENT, 6; RECORD, 5.

DITCH—See NEGLIGENCE, 6; PLEADING AND PRACTICE, 5.

DUMP.

1. "*Inconvenience*" does not amount to "obstruction" in a covenant concerning the deposit of quarry refuse. *Keeler v. Green*, 465
See LICENSE, 1.

EASEMENT—See PRESCRIPTION, 1.

EJECTMENT.

1. *Recovery on possession*.—Plaintiffs in ejectment for a mining claim may rest their recovery upon prior possession, and the action does not necessarily put in issue the legal title. Their recovery will not be conclusive of the title of their grantor. *Grady v. Early*, 104

2. *Ouster defined*.—An entry on the land of another under assertion of title is an ouster; otherwise a mere trespass. *West v. Lanier*, 184

3. *Where both parties claim under a common source*, it is not necessary for plaintiff to trace his title beyond it. *Turner v. Reynolds*, 190

4. *Possession sufficient against intruder*.—If the defendant be in possession as a mere intruder, it is only necessary to show the prior possession of plaintiff, without showing a legal title in him. *Id.*

5. *In ejectment plaintiff must recover on strength of his own title*.—The court instructed the jury, 1st, that if they found that plaintiff located their claim as now claimed, before the location of defendants' claim, they should find for the plaintiffs; 2d, if they found that defendants never located any claim adjoining plaintiffs' claim, they should find for the plaintiffs. *Held*, that the instructions were wrong, as violating the principle that plaintiff must recover on the strength of his own title; that defendants, having been in actual possession for a long time, were not required to show anything beyond it, until a paramount right was shown in plaintiffs; that it was not essential to defendants' possession to show that they had ever formally located their claim in accordance with any mining regulations, or that they had or claimed any other mining ground. *Pennsylvania M. Co. v. Owens*, 200

6. *Variance—Averring a holding under district rules, when no district exists*.—When plaintiff declared for placer ground as held under

EJECTMENT. *Continued.*

rules of the mining district and it appeared that there was no mining district nor district rules, evidence of actual possession was excluded and the plaintiff held to be rightfully nonsuited. *Moxon v. Wilkinson*, 602
See RECEIVER, 12.

EMINENT DOMAIN—See QUO WARRANTO, 4; RAILROADS, 8.

ERROR.

1. *When evidence is not objected to* at the trial its admission will not be considered as error. *Curtin v. Munford*, 585
See ADMISSIONS, 2; APPEAL; INSTRUCTIONS, 1; PLEADING AND PRACTICE.

ESTOPPEL.

1. *Where two claims overlapped* and plaintiff's only possession of the disputed gore of land was a shaft sunk several years prior to the suit, the plaintiff, in trespass, asked the following instruction: "If the jury believe from the evidence that plaintiffs, * * * more than five years prior to the commencement of this suit, in good faith and under a claim of right, entered into the possession of said disputed ground, and have continued in possession thereof, and expended labor thereon, (with the knowledge of defendants, * * * they making no objections thereto,) and that defendants have not forbidden plaintiff's possession so acquired, then the plaintiff is entitled to a verdict." *Held*, that the instruction failed to state the essentials of estoppel *in pais* and was not otherwise relevant. *Maine Boys' T. Co. v. Boston T. Co.*, 247
See ADMISSIONS, 1; RES ADJUDICATA, 2.

EVIDENCE.

1. *A man's belief is a condition of his mind* and can not affect the title to his property. *Baker v. Chase*, 66
2. *Certificate of entry at U. S. land office as evidence.*—To admit in evidence the certificate of the register of the United States land office showing a mining claim in controversy to have been entered for patent, it is necessary to first prove the signature of the register. *Jackson v. McMurray*, 164
3. *On cross-examination* the defendant is to be confined to the testimony given by the witness in chief. *Turner v. Reynolds*, 190
4. *Justice's docket no evidence of service.*—The docket of a justice of the peace is only primary evidence of those facts which it is required to contain, and as it is not required to contain a finding that summons was served, the service can not be proved by it. *Scorpion Co. v. Marsano*, 502
See ABANDONMENT, 2; ADMISSIONS; DEPOSITIONS; POSSESSION, 17.

EXECUTION.

1. *Motion to stay proceedings on execution.*—Defendant moved to stay proceedings on execution upon a judgment by confession entered on a bond and warrant of attorney given for money loaned, and also asked for the award of a feigned issue to try the question whether the debt, which was the consideration of the bond, had been paid, the defendant claiming that subsequent to the giving of the bond, the plaintiffs had become in-

EXECUTION. *Continued.*

debted to him upon a coal contract and lease in a sum sufficient to discharge the debt secured by the bond; but it appearing to the court from the testimony taken in pursuance of the motion, that there was a balance due from defendant to plaintiffs independent of the debt secured by the bond, and that no part of the debt so secured had been paid, the motion was denied. *Audenried v. Woodward*, 641

See RECEIVER, 1.

FORCIBLE ENTRY.

1. *Nature of action of forcible entry.*—All that is necessary to sustain this action is, that defendant should forcibly and illegally have turned the plaintiff out of possession. It may be brought even against the legal owner. *Lorimier v. Lewis*, 437

2. *Possession got by force—Nevada practice.*—Possession is not essential to enable the plaintiff to recover in an action to remove a cloud upon his title; and under the Practice Act, Sec. 256, the right of action to quiet title is given to any one in possession, so that in either case the objection that plaintiff obtained possession *vi et armis* can not be inquired into. *Scorpion Co. v. Marsano*, 502

See LOCATION, 7; POSSESSION, 23.

FORFEITURE.

1. *Forfeiture under mining laws a question for the court.*—Mining laws, when introduced in evidence, are to be construed by the court; and the question whether by virtue of such laws a forfeiture has accrued, is a question of law. To submit such question to the determination of the jury is error. *Fairbanks v. Woodhouse*, 86

See RECEIVER, 5.

FRAUD.

1. *Form of complaint in action based on sale of mine, induced by fraud.* *Ahrens v. Adler*, 114

2. *Action for false averment of value—Ex delicto.*—A complainant averring that the defendant, by false representations of the value of a lode, induced plaintiff to purchase and pay a sum of money therefor, and the receipt of the deed from defendant, and claiming general damages exceeding the consideration paid, is an action *ex delicto* and not *ex contractu*. *Id.*

3. *Extent of recovery for fraudulent sale.*—In action for damages for the fraudulent sale of a mine, the plaintiff's recovery is not restricted to the amount of the consideration paid by him. *Id.*

4. *Vendee surrendering property to adverse claimant.*—One who buys machinery which is in litigation, giving his note in payment therefor, commits fraud on the vendor by delivering possession and executing conveyance of his right thereto, to the party holding the adverse title, upon mere demand without legal compulsion, and can not afterward plead, as a defense to the note, the fraudulent conduct of the vendor in selling the property. *First Nat. Bank v. How*, 134

5. *Idem—Pretended failure of consideration.*—In an action upon a note, the maker does not show failure of consideration by alleging that the payee had no title to the property, in payment of which it was made,

FRAUD. *Continued.*

where it further appears that the maker had delivered to a claimant, without legal necessity, the property which he had bought and received from the payee. *Id.*

6. *Insufficient averment of fraud.*—The allegation in a pleading that a certain suit was corruptly and fraudulently dismissed, is not sufficient. The facts constituting the fraud must be set forth. *Id.*

7. *Alleged assertions contrary to what was visible,* concerning "objects of sense" which the party alleged to have been defrauded had in fact seen, are not to be considered as grounds for equitable interference. *Jennings v. Broughton*, 405

8. *Essentials of fraudulent representations.*—Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material; such as if true would add substantially to the value of the thing sold; must not be mere conjectural statements, and must be made without a belief in their truth or without grounds for such a belief. *Id.*

9. *Pretended sale for cash—Sight draft.*—Where a bill to rescind a sale of land averred that the intended consideration was *cash*, to which end a sight draft had been given that had not been paid, and whose drawers were insolvent, and this was not denied, it was held that there was equity in the bill and that it stood confessed. *Carter v. Hoke*, 579

10. *Deendant refunding to co-defendant after suit brought.*—Where a defendant charged with receiving funds from a co-defendant for the purpose of defrauding the plaintiffs, after the suit had been begun repaid these funds to his co-defendant from whom he had received them: *Held*, that such payment could not save him from a decree requiring him to pay the full amount to the plaintiffs. *Hoyt v. Smith*, 326

See ACCOUNT, 1; ASSIGNMENT, 1; CONSIDERATION, 1; PARTNERSHIP, 2, 3; PROSPECTUS, 1, 2; RAILROADS, 13; RELEASE, 1; RENTS AND ROYALTIES, 1, 2.

INFANT—See BOUNDARIES, 1; PROS. CONT., 6.

INJUNCTION.

1. *Parties to bill for injunction—Parting with their interest before decree.*—Parties in interest must be before the court, and where the complainants' lessees of a lead mine had procured a temporary injunction to restrain the defendants from working the leased premises, and before the final hearing the lease had expired and had not been renewed, and the lessor had sold his interest in the premises, it was held error to decree a perpetual injunction without first bringing in the real parties in interest. *Laird v. Boyle*, 82

2. *Court can not qualify its protection to suitors.*—Where a right of a plaintiff is, under the pleading and evidence, shown to be absolute, the court has no right to qualify the protection which the law gives to such right. *Gregory v. Nelson*, 124

3. *Idem—Injunction allowed upon bargain and condition.*—Where a party has shown his absolute ownership in a ditch, and the defendant shows no right to destroy it, the court can not, by its decree, allow a defendant to wash away the ditch upon building a flume and carrying its water, and giving bond to pay all damages. *Id.*

INJUNCTION. *Continued.*

4. *The court can not license a trespass, nor compel a party to an exchange of property, upon the pretense of convenience or necessity. Id.*

5. *Injunction against mixing and removing ores held as security.*—When a bill averred that a large lot of iron ore, classed as No. 1 in quality, had been set aside to complainant to secure an indebtedness, and that an assignee of the debtor had taken possession, was mixing it with inferior ore, and shipping it beyond the reach of complainant, *held*, a case for injunctive relief, although sundry of the averments were so defectively made that a special demurrer might have been sustained to them. *Glidden v. Norvell*, 170

6. *Idem—Destroying security not permitted although defendants be solvent.*—In such a case, where the relief to which complainant is entitled could not be granted by a court of law, and securities would be destroyed, an injunction should be granted even if all the defendants were solvent. *Id.*

7. *The failure to verify an injunction bill* is of no importance except on the motion for injunction and a verification can be allowed when such motion is made. *Id.*

8. *Injunction—Answer used as affidavit.*—The apparent weight of authority is that an answer filed, after notice by the plaintiff of an application for a special injunction, can only be used as an affidavit; and the defendant can not insist that, under such circumstances, the plaintiff is confined in his injunction to the equity confessed in the answer. *Waring v. Cram*, 280

9. *Clear equity required before injunction issues.*—A court of equity never awards a special injunction, except when the plaintiff shows a clear equity entitling him to the aid and relief asked for, nor is it ever awarded except in clear cases of right. *Id.*

See PROSPECTUS, 2; RAILROADS, 7; RECEIVER, 2, 10.

INJUNCTION BOND.

1. *The injunction bond* affords an ample remedy for any damage sustained if the writ has been fraudulently obtained, and these matters are not grounds for filing a bill for an account. *Hall v. Fisher*, 88

INSPECTION.

1. *No order interlocutory to break soil.*—An order having been allowed on motion, before the hearing, giving plaintiff liberty to enter plaintiff's ground for the purpose of inspection, with leave to dig a trench to ascertain the geological formation, etc., it was *held*, on appeal, that an order allowing the breaking of the soil before the hearing was not according to the course of the court, and the order was discharged in that particular. *Ennor v. Barwell*, 101

INSTRUCTIONS.

1. *Instructions that mislead not given.*—The court will not give an instruction, though correct, if it will mislead the jury. *Boucher v. Mulverhill*, 350

See PLEADING AND PRACTICE, 4.

JUDGMENT.

1. *Judgment on matters not in issue.*—In an action brought to obtain

JUDGMENT. *Continued.*

decree, restraining defendants from destroying plaintiffs' ditch over certain ground, which decree, recited "that defendants have title and right of possession to the mining land in action, as defined in defendants' answer." *Held*, that the judgment being upon matters not in issue, was, upon this point, superfluous and nugatory. *Gregory v. Nelson*, 124

2. *Idem*—*Judgment void for uncertainty*.—Where a decree recited that plaintiff had the right of way, for the purpose of conveying water across certain mining ground, without specifically defining it either in the terms of the decree, or in any of the pleadings, the recital is ineffectual as a judgment of right of way. *Id.*

3. *Judgment must be a sequence to what the pleadings establish*.—In an action to enjoin the destruction of a ditch, the complaint averred ownership of the ditch; that it had been constructed over vacant ground, and a user for years; none of which allegations were denied, nor any claim of prior right or usage asserted, by which such ditch might be destroyed. *Held*, that the pleadings left an admitted and absolute right in the plaintiffs and entitled them to an unqualified decree. *Id.*

See PERSONAL LIABILITY, 6, 14.

JURISDICTION.

1. *Justice's jurisdiction*.—An action on a labor debt may be brought in a justice's court, against a corporation and stockholders jointly, under Act 113 of 1877, § 35. The legislature is not forbidden by the constitution to give jurisdiction to the circuit courts in cases where the amount claimed is less than \$100. *Milroy v. Spurr Mtn. Co.*, 53

2. *Judicial notice of non-residence*.—A Michigan court may well take judicial notice that stockholders in the mining corporations of the State are largely non-residents and beyond their jurisdiction for rendering personal judgments. *Id.*

3. *Where there is no special plea to the jurisdiction*, it is error to submit a jurisdictional point to the jury in such a way that if they found against the jurisdictional fact the result would be a judgment, apparently in bar, when the plaintiff would be entitled to another trial in a court having jurisdiction. *Fairbanks v. Woodhouse*, 86

JUROR.

1. *Discretion in excusing juror*.—During the examination of a juror, the fact was elicited that there had been a forcible entry and detainer suit for the same ground in controversy, and thereupon another juror, named Taylor, who had been previously called and accepted, volunteered the statement that the title had been spoken of in the forcible entry case, and that his opinion was concluded on the title. The plaintiffs then challenged Taylor for cause, defendants resisting on the ground that it was too late, but the court excused him. *Held*, no abuse of discretion. *Grady v. Early*, 104

JUSTICE OF THE PEACE.

1. *Justice of the peace, his own clerk*.—Act 113 of 1877, § 35, provides that in actions on labor debts, the clerk of the court shall indorse directions on the execution. *Held*, to refer to the officer issuing execution, and not to exclude the justices' courts, in which the justice is his own

JUSTICE OF THE PEACE *Continued.*

- clerk, from jurisdiction of such actions. *Milroy v. Spurr Mtn. Co.*, 53
See JURISDICTION, 1 ; EVIDENCE, 4.

LACHES—See RESCISSION, 3.

LAND.

1. *Coal is land.*—A vein of coal is land, unless distinguished from the land by the deed of conveyance. *Wilkinson v. Proud*, 269
2. *A legacy charged on land is an interest in land* within the Statute of Mortmain, and can not, while it remains unpaid, be bequeathed for charitable uses by the legatee. *Brook v. Badley*, 649

LAND OFFICE.

1. *Implications based on land office action.*—The decision of the register and receiver of the United States land office in favor of an applicant for pre-emption, is evidence not only that such person is entitled to a patent, but that he has settled upon and improved the land, and is an acknowledgment that his settlement and possession are lawful, and in accordance with the will of the government. *Courchaine v. Bullion Co.*, 236
2. *Land office adjudications.*—Although the decision of the register and receiver is not a judicial decision, and although liable to reversal by the commissioner of the general land office, it is evidence of the facts upon which it is supposed to be based, until actually reversed. *Id.*
See EVIDENCE, 2.

LEASE.

1. *Lease not affected by prior agreement of sale.*—A son took possession of a coal vein under a parol agreement with his father (who owned a tract on which another and larger vein was opened) that he should have the smaller vein if he opened it. A lease was afterward made by the father to the son and others, by which the lessor "demised, let and to mine let," all the tract of land referred to, known as No. 49, and the coal bed thereon and now opened. *Held*, that after the lease the son with his co-lessees was in possession as tenant and not as owner. *Turner v. Reynolds*, 19)
2. *Agreement for, construed as a lease.*—An agreement to lease land for a term of years, with the exclusive right to bore for and collect oil, giving one fourth to the lessor. *Held*, to pass a corporeal interest. *Chicago Co. v. U. S. Co.*, 570
3. *The taking by lessee of his share* of the oil found is not waste, but a rightful act, unless the lease be forfeited by its own terms. *Id.*
4. *Evidence of increased value of mine due to development—Expert.*—To show the increased value given to premises by improvements in developing mines, a witness was called who knew the premises before and after improvements were made, had large experience in ore and iron, knew the character of the improvements, the ore banks in question, and was familiar with mining operations in the vicinity. *Held*, that the witness had sufficient knowledge to form an intelligent opinion of the value of the premises before and after development, and other evidence showing some of the improvements to have been of a permanent and valuable character having gone to the jury, the testimony of the witness should have been admitted. *Kille v. Ege*, 654

LEASE. *Continued.*

5. *Quantity of land embraced in leased tract*—*Question for jury.*—Where there was a conflict of testimony, the question of fact as to the quantity of land in a certain tract embraced in a lease should have been left to the jury, and it was error in the court to assume that a certain number of acres were contained therein. *Id.*

6. *Penalty not enforced in equity.*—A court of equity will not entertain a bill filed against lessee of stone quarries to enforce the penalty under the statute (4 Geo. II, Ch. 28), nor compel a discovery in aid of an action to enforce the penalty against a tenant holding over. *Cross v. McClenahan*, 669

7. *Idem.*—Equity will sometimes relieve against, but will never enforce a penalty.

See ASSIGNMENT, 2; CONSIDERATION, 3; MEASURE OF DAMAGES, 6; PARTIES, 3; RECEIVER, 4; RELEASE; RAILROADS; SURFACE SUPPORT, 1.

LICENSE.

1. *A general license to dump quarry strippings on adjoining land is deemed a continuing license until revoked.* *Keeler v. Green*, 465

LIS PENDENS.

1. *Necessity of lis pendens.*—Under the California statute, the mere pendency of a suit does not charge the purchaser of the subject of it as a purchaser *pendente lite* at common law. To have that effect a notice of *lis pendens* must be filed or appear of record. *Head v. Fordyce*, 470

LOCATION.

1. *Location presumed where possession held during period of statute.*—When a purchaser of a lode claim has, under color of title, been in possession during the period of the Statute of Limitations, he is not required to make proof of a valid location; his location will be presumed to have been regularly made, and will defeat an adverse location made during such possession. *Harris v. Equator Co.*, 178

2. *Distinction in favor of purchaser.*—The purchaser of mining ground may occupy a position different from the locator. As against the government, only strict compliance with the law regulating location, will avail, but the purchaser has a better right as against other citizens seeking to locate the same ground. *Id.*

3. *A party taking up a claim in excess of the legal limit* may hold the excess against a mere intruder, but not against a subsequent locator. *English v. Johnson*, 203

4. *Modes of holding a mining claim.*—A mining claim on the public domain may be held either by actual occupancy and the exercise of control over it by distinctly indicating the boundaries by monuments and marks, or by occupancy in accordance with the local mining customs. *Hess v. Winder*, 217

5. *Marks and stakes.*—The physical marks sufficient to serve as notice of the possession of a mining claim, must be of sufficient prominence to be found by one honestly concerned to discover whether the land has been previously appropriated for mining purposes. *Id.*

6. *Insufficient location.*—Posting notice upon a five-sided tract claimed

LOCATION. *Continued.*

for mining purposes, and the marking of three of its corners, in the absence of any mining district rule in the district, *held*, no valid or sufficient location or possession. *Id.*

7. *Entry upon possession with intent to initiate location.*—Where, in an action for unlawful entry, the evidence showed that the defendant entered upon mining ground in the possession of the plaintiff without previous color of right, but under the claim that plaintiff's location was void, and with intent to re-locate, it was *held*: that a party can not enter for the purpose of obtaining title, but must have it before he enters; and the court refused to instruct the jury that if defendant entered upon the lands peaceably and in good faith, believing that they were open to location, the entry in such case was not unlawful. *Phenix Mill v. Lawrence*, 261

8. *Location by absent outfitters.*—The mining law of a district, which allows those who furnish money and provisions to the discoverers of placer gold mines to hold claims without personally pre-empting them, is not against public policy, and should be upheld. *Boucher v. Mulcerhill*, 350

9. *Citizen may locate by agent.*—Any citizen who is entitled to locate a lode on the public domain may perform all necessary acts of appropriation and development through the agency of others. *Murley v. Ennis*, 360

10. *Reasonable time to perfect location.*—Upon discovering a lode the locator is allowed a reasonable length of time in which to perfect the development which the local law requires of him. *Id.*

11. *Locations of lodes and placers distinguished.*—The mining acts of the United States make a distinction between lode and placer claims, and a compliance with the law relating to the record of lode claims is not a means of perfecting title to a placer claim. *Moxon v. Wilkinson*, 602

12. *Location described.*—Location consists of a number of distinct acts; all must be performed before a legal location exists. *Gonn v. Luss-Il*, 630

13. *The fixing of a location stake* does not perfect a location; the marking of the boundaries is essential. *Id.*

See DISCOVERY, 1; POSSESSION, 7, 10; RE-LOCATION.

LOCATION CERTIFICATE.

1. *Record of location—Original notice.*—The county record of a notice of location, though taken from a draft on paper, may be, by custom, the original notice of the location of a mining claim. *Pralus v. Pacific Co.*, 478

See LOCATION; RECORD.

MALICIOUS PROSECUTION.

1. *Allegations in suit for malicious prosecution.*—An action for malicious prosecution will not lie until the final termination of the suit, and the complaint should allege want of probable cause, by averring that the suit was finally determined in favor of the defendant therein. *Hall v. Fisher*, 88

MASTER AND SERVANT.

1. *Employees of corporation—When not fellow-servants.*—It is not law "that the defendant, being a corporation, and unable to act other-

MASTER AND SERVANT. *Continued.*

wise than by means of servants, all persons employed by it in the same general business must necessarily be fellow-servants, within the rule exempting the master from liability for the negligence of one servant to another." *Knaresborough v. Belcher Co.*, 155
See NEGLIGENCE.

MEASURE OF DAMAGES.

1. *Where the next of kin are collateral relatives of the deceased*, who have not been receiving from him pecuniary assistance, and are not now in a situation to require it, only nominal damages can be given; but where they were dependent on the deceased for support, they are entitled to compensatory damages without regard, in either case, to the distance of the relationship. *Quincy Co. v. Hood*, 148

2. *Dependency on deceased for support*.—In the case of collateral kindred it will be admissible for the defendant to controvert the fact of dependency upon the deceased for support; and in case of a father as the next of kin, to show that he was not entitled to the services of his minor child, in reduction of the damages. *Id.*

3. *Measure of damages in trespass—Royalty not deducted*.—In trespass for taking coals where the trespasser is a mere wrong-doer, the measure of damages is the value of the coals at the time when they first existed as chattels, and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine owner on coals got from the mine. *Wild v. Holt*, 182

4. *Condition of penal bond*.—Where the provision for the payment of a fixed sum on the breach of an agreement is found in the condition of a bond containing a larger penal sum, the presumption is that the sum named in the condition was not designed as a penalty. *Cottheal v. Talmage*, 29)

5. *Value without deducting cost of getting*, taken to be the rule in admoting damages, there having been a taking with knowledge. *Ecclesiastical Com'rs v. N. E. Ry Co.*, 609

6. *Evicted lessee—Rent*.—Defendants, in an action for mesne profits, had leased premises for a term of fifteen years, at an annual rental of \$2,000, besides the payment of royalty on each ton of iron ore mined, and received the rent for one year, but the premises were in no way injured and no ore was taken therefrom. Defendants, having been evicted by plaintiffs, became unable to fulfill their covenants in the lease, and lessees thereby acquired a right of action against them for damages. *Held*, that the \$2,000 received by defendants did not, under these circumstances, establish a correct basis for fixing the just rental value of the premises. *Kille v. Ege*, 654

See DEFAULT, 1; LEASE, 4; PROS. CONT., 7, 8; RAILROADS, 10.

MEXICAN GRANT.

1. *Mexican grant of land, does not include mines of gold and silver*.—By the law of Spain, the mines were the property of the crown, as part of the royal patrimony. The Mexican law on this subject was derived from the Spanish law, differing from it only in the particulars occasioned by the change in the form of government following the separation of Mexico

MEXICAN GRANT. *Continued.*

from the Spanish authority. Under this law, all mines of gold and silver in the country, though found in the lands of private individuals, were the property of the nation. By the ordinary grant from the government of Mexico to an individual, only an interest in the surface or soil passed; no interest in minerals passed without express words designating them. *Moore v. Smau*, 418

2. *Cession by Mexico of Mariposa tract included mines.*—At the date of the cession of California, no minerals of gold or silver had been discovered in the grants under consideration in this case (the Mariposa and other tracts), and of course no proceedings had been taken by which any individual interest had been acquired from the Mexican government. Such minerals, therefore, were at that time the property of the Mexican government, and passed by the cession to the United States government. *Id.*

3. *Patent confirming Mexican grant conveys precious metals.*—There is nothing in the act of March 3, 1851, which restricts the operation of patents issued in confirmation of the rights acquired by grants from Mexico; and although the interest transferred by Mexico to its grantee did not include the precious metals, yet patents issued in confirmation thereof can not in any respect be distinguished from the general class of conveyances made under that designation by the United States. *Id.*

See MINES, 2.

MINES.

1. *Royal mines—Various nations.*—The general policy of the British, Spanish, Mexican, and incidentally of the French governments, to their mines of the royal metals, stated. *Moore v. Smau*, 418

2. *Conveyance of royal mines in Mexico.*—Under Mexican law the interest in the royal minerals was conveyed under the mining ordinances by registry of discovery in case of new mines, and by denouncement in case of abandoned mines. *Id.*

MINERALS.

1. *Sulphur—Similar produce.*—Whether sulphur was a "similar product" under a contract based particularly upon the expectation of finding petroleum—not decided. *Escoubas v. Louisiana Co.*, 344

See PATENT, 1; PUBLIC DOMAIN, 1, 2.

NEGLIGENCE.

1. *Joinder of causes of action.*—In an action for injuries to mining claims occasioned by the negligent building of defendants' dam, the plaintiffs claimed damages for the washing away of their pay-dirt, and also for preventing them from working their claims by reason of the overflow. *Held*, that there was no improper joinder. *Fraler v. Sears Co.*, 98

2. *Carelessness of party injured.*—The want of reasonable care on the part of another who is injured by the breaking of a dam, can not be set up in defense to an action for damages for the injuries thus suffered. *Id.*

3. *Prerequisite to recovery on account of death by negligence.*—Under the statute giving an action for wrongfully causing the death of a human being, there must concur the wrongful act, causing the death under such

NEGLIGENCE. *Continued.*

circumstances as would have entitled the intestate to action if death had not ensued, and the survival of the widow or some person next of kin; both these facts being proved, the plaintiff is entitled to nominal damages at least. *Quincy Co. v. Hood*, 148

4. *Duty of company to protect gangway—Notice to overseer.*—Where the servant of a mining company was killed by the falling of a rock from the roof of a common gangway in a coal mine, and it was sought to charge the company with negligence in not keeping the roof in safe condition, it was *held*: that notice to the superintendent of the dangerous condition of the roof, was notice to the company; and if this was long enough before the accident to have given time to repair the same, was sufficient to fix negligence upon the company. *Id.*

5. *Sufficient allegation of the fact of negligence.*—The plaintiff sued for injuries caused by a defective platform upon which he was at work, and in his complaint alleged that the defendant provided the platform negligently, but did not allege that defendant knew of the defect, nor that plaintiff was ignorant of it. *Held*, that the complaint stated a good cause of action, and that the plaintiff in making out his case could not be required to show a want of concurring negligence, the proof of which should rest with defendant. *Knaresborough v. Belcher Co.*, 155

6. *Percolation into tunnel from irrigating ditch—Sic utere tuo, applied to interfering rights.*—Where defendant, owning an agricultural claim located prior to plaintiffs' mining tunnel, by the use of water for irrigation caused damage to the tunnel, through the percolation of the water in such quantities as to prevent working it. *Held*, that plaintiffs had no rights under the act of April 25, 1855, relating to mining upon inclosed lands; 2, that defendant was not liable, if the proper use of the water interfered with the later appropriation of plaintiff; 3, that the maxim, *sic utere tuo ut alienum non lædas* applied, and defendant was answerable only for injuries caused by negligence or malice. *Gibson v. Puchta*, 227

See DAM, 1; MASTER AND SERVANT, 1; MEAS. DAM., 1, 2; PARTIES, 2.

NEW TRIAL.

1. *Newly discovered cumulative evidence no ground for new trial.*—A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative and going to contradict the witnesses of the other party. *Live Yankee Co. v. Oregon Co.*, 94

2. *Surprise as ground for new trial.*—Mere surprise at the evidence given by the witnesses of the defendant, is not sufficient ground for granting the plaintiff a new trial. He should submit to a nonsuit, and not take his chances for a verdict. *Id.*

3. *New trial, where verdict is against the evidence.*—This court, on review of the proper motion made in the court below and there denied, will order a new trial where the evidence given at the former trial was, without substantial conflict, opposed to the verdict. *Maine Blys' T. Co. v. Boston Co.*, 247

NOTICE—See CORPORATIONS, 2; JURISDICTION, 2; LIS PENDENS, 1; LOCATION, 13; LOCATION CERTIFICATE, 1; NEGLIGENCE, 4.

OCCUPATION—See POSSESSION.

OIL.

1. *Sudden flow of oil in unexpected quantity* considered in connection with alleged breaches of the covenants of the instrument under which the strike was made. *Chicago Co. v. U. S. Co.*, 570
See MINERALS, 1; PROS. CONT., 20; RAILROADS, 6.

ORE—See INJUNCTION, 5.

PARTIES.

1. *Misjoinder of parties and causes of action*.—Plaintiff filed complaint in his own right and as administrator, against the defendants personally and as executors, for an account of ore dug from an iron bed, of improvements made, and for all loss, damage and injury occasioned by the acts of the defendants and their testator; also for damages occasioned by an injunction wrongfully sued out, etc. *Held*, that the plaintiff could not sue in his own right and in a representative capacity. 2. That there was a misjoinder of matters of contract with matters of tort and the matters of tort themselves involved both trespass and negligence, each of which should have been specially declared on, and that judgment was rightfully allowed for defendant on the demurrer. *Hall v. Fisher*, 88
2. *Next of kin named in declaration*.—In an action by an administrator for damages on account of death by negligence, where the declaration describes the next of kin to be the father, the court can not admit proof of loss to other relatives. *Quincy Co. v. Hood*, 148
3. *Suit in name of landlord for use of tenant*.—Where a railroad company has the right of way over mining lands, and covenants with the owner thereof that upon notice it will change its location, or permit the coal underneath the way to be mined, a tenant of such owner—the terms of whose lease give him the right to mine all the coal in the land demised—may sue in the name of the landlord for breach of such covenant. *Mine Hill Co. v. Lippincott*, 555
4. *Retrospective statute, removing disability of person*.—A foreign corporation, prohibited from holding real estate in Pennsylvania, brought an action of replevin for ore taken out by them under a mining lease; subsequently an act was passed allowing them to sue, and providing that any pending suit should be treated as brought under such act. *Held*, that the action could be maintained. *Green v. Ashland Co.*, 692
5. *Inability to recover, distinguished from incapacity to maintain suit*. *Id.*

See INJUNCTION, 1.

PARTITION.

1. *Cot-tenants may part the mine*.—When a mining claim upon the public lands is claimed and possessed by several as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants the same as other real property. *Hughes v. Derlin*, 242
2. *Partnership no bar to partition*.—The mere fact that a claim is owned and worked by several persons as partners, is no valid objection to

PARTITION. *Continued.*

a partition of the same between the owners, where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership. *Id.*

3. *Where a sale and division*, not a partition, is had, the statute does not require referees. *Id.*

PARTNERSHIP.

1. *Use of partnership capital after dissolution.*—If a partnership, after its termination by death, dissolution, bankruptcy or otherwise, is continued by any portion of the associates with the capital or appliances of the firm, all profits derived from such continued business are part of the joint estate, and as such are to be accounted for to all the partners or their representatives. *Waring v. Cram*, 280

2. *Clandestine profits.*—If one partner clandestinely carries on another trade, or the same trade, for his private advantage, and in a manner injurious to the true interests of the partnership, he will be compelled in equity to account for all profits made thereby. *Id.*

3. *Misapplied capital and stolen time.*—If one of several partners employ the partnership capital or effects, in a matter not the direct object of the association, he must account with his copartners for the profits resulting from such an employment of the common effects. If the common stock and fund or capital of a copartnership consist of labor and skill, as well as money, and during the existence of the enterprise either diverts that from the common object to which it was pledged and employs it for other productive purposes, either of the same or any other kind, he must bring the result into the common fund. *Id.*

4. *Where associates employ one of their own number to do a stranger's work* they are equitably bound to pay him a stranger's wages. *Duff v. Maguire*, 353

See PROS. CONT.

PATENT.

1. *United States patent conveys minerals.*—The patent of the United States passes to the patentee all the interest of the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed or fixed to its surface; in fact, in everything embraced within the term "land." *Moore v. Smaw*, 418

2. *Patent construed as deed.*—The conveyance of land by an individual carries the deposits of gold and silver, unless expressly reserved, and the United States, with reference to their real property within the limits of the State, occupy only the position of a private proprietor, with the exception of exemption from State taxation; and their patent must receive the same construction, with reference to the precious metals, as the deed of an individual. *Id.*

3. *Patent contrary to reservation.*—A patent for a saline which was, under the general law, reserved from sale, is void. *Morton v. Nebraska*, 451

See MEXICAN GRANT; RELATION, 1.

PAYMENT—See RECORD, 2.

PENALTY—See DEBT; LEASE, 6, 7; MEAS. DAM., 4.

PERSONAL LIABILITY.

1. *What stockholders liable for debts.*—Where the charter of a mining company declared the stockholder personally liable for the payment of all debts or demands against the company, *held*, that a suit to assert such personal liability could be maintained only against such as were stockholders when the debt was contracted. *Moss v. Oakley*, 1

2. *Presumption that note was coeval with debt.*—In a suit brought against a stockholder after judgment recovered upon a promissory note given by the company, the note will be presumed to have been made when the debt was contracted until the contrary be shown. *Id.*

3. *Presumptions after judgment.*—The judgment against the company is at least *prima facie* evidence of the validity of the note, under such circumstances; and *quære*, whether the defendant will be allowed to impeach either note or judgment on any other ground save that of fraud. *Id.*

4. *Personal liability of corporators.*—In California each member of an incorporated company is answerable, personally, for his proportion of the debts and liabilities of the company. *Mokelumne Co. v. Woodbury*, 6

5. *Idem—Nature of liability.*—Each corporator is a principal debtor, and not a mere surety for the corporation, and in relation to the creditors of the corporation, stands on the same footing as if it were an ordinary partnership. *Id.*

6. *Merger of debt in judgment.*—In an action upon a judgment recovered against a corporation, R. was summoned as a stockholder. Upon the trial it appeared that R. was liable upon the original debt, but was not made a party in the original suit, and had ceased to be a stockholder at the time the judgment was obtained. *Held*, that the original debt was merged or extinguished by the judgment and a new debt created thereby, for which R. was not liable. *Handrahan v. Cheshire Works*, 9

7. *Neglect to make the report* required by sections 5, 18 or 19, or neglect to file it in any of the requisite places, will be presumed to be intentional, and such neglect unexplained renders each director liable for all debts of the corporation contracted during the period of such neglect. *Van Etten v. Eaton*, 12

8. *Object in requiring reports.*—The object of the legislature in requiring the reports to be made and filed was to secure accessible means of information respecting the financial condition of the corporation, whenever it should be actually conducting its operations. *Id.*

9. *Individual liability of corporators.*—When the charter of a corporation provides that where its officers shall neglect to make and publish certain reports required, they shall be individually liable for all corporation debts contracted while they are officers or stockholders, and when, while they were such, they were guilty of such neglect, and in the meantime the corporation became indebted to the plaintiff by note: *held*, that he might maintain an action of debt therefor against such delinquent officers. *Union Iron Co. v. Pierce*, 19

10. *Reports of officers.*—Where the charter of a corporation required

PERSONAL LIABILITY. *Continued.*

its officers annually, between the 1st and 20th of January, to make and publish a certain report, *held*, that a company incorporated in May, 1867, was bound to make and publish such report in the following January. *Id.*

11. *A mining corporation is not a manufacturing corporation*, within the statute of 1862, chapter 218, defining and regulating the enforcement of the liabilities of officers and stockholders of manufacturing corporations. *Byers v. Franklin Co.*, 27

12. *Liability enforced in equity.*—By statute, a creditor of a mining corporation may maintain a bill in equity against the officers of the corporation who are liable for its debts. *Id.*

13. *Acceptance of draft for accommodation.*—A debt due from a corporation to one who has accepted the company draft for its accommodation, and who paid it at maturity, is a debt contracted at the time of acceptance. *Id.*

14. *Merger of debt in judgment.*—The fact that a creditor has taken judgment against a corporation does not preclude him from enforcing the liability of the officers of the corporation for the original debt by a bill in equity. The debt is not so merged in the judgment as to extinguish their liability under the statute. *Id.*

15. *The liability statutory—Strict proof and construction.*—In order to fix liability upon one for the debt of a private corporation organized under the general law which makes stockholders individually liable to the creditors of the company to an amount equal to the stock held by them, it must be made plainly to appear that he was a stockholder, and within the purview of the law. The meaning of the statute can not be enlarged so as to include cases not expressly within its provisions. *Steele v. Dunne*, 39

16. *The mere fact that the defendant was a director* in such a company is not sufficient to make him liable individually within the meaning of the statute. *Id.*

17. *Liability of stockholder where company has re-organized.*—Where it appeared that the defendant was a director in the Piute Mining Co., which company had never issued any certificates of stock, and it was not shown that he ever subscribed for stock, but it appeared that he was a stockholder in the Piute Silver Mining Co., which was a company subsequently organized with a different directory and in a manner succeeding the Piute Mining Co. *Held*, that he was not liable individually in a suit by a creditor of the first named corporation. *Id.*

18. *Liability of holder of stock paid for with property.*—The petition of a creditor of the La Motte Lead Co., which had become insolvent and dissolved, was held not sufficient to open an inquiry into the transaction between the incorporators and the company as to the value of the property conveyed to the company in payment of shares, with a view to hold a s are owner for the difference between the agreed value and the actual value of the property conveyed. *Phelan v. Hazard*, 42

19. *Individual liability under statute and constitution.*—The individual liability for labor debts imposed on stockholders by the constitution, means a liability beyond that of members of the corporation, and does not refer to their several liabilities. The legislature may prescribe the

PERSONAL LIABILITY. *Continued.*

means of enforcing the constitutional liability of stockholders for labor debts. *Milroy v. Spurr Mtn. Co.*, 53

20. *Joinder of parties.*—Act 113 of 1877, authorizes suits for labor debts to be brought against a corporation alone or jointly with one or more of the stockholders. And where a claimant has elected to sue the corporation alone and has recovered judgment, he can not afterward bring his action on the same debt or upon a claim including it, against the corporation and stockholders jointly or conversely. *Id.*

21. *Corporate property first taken.*—Under act 113 of 1877, the property of a corporation is made primarily liable for labor debts, and the individual property of stockholders secondarily liable, and the stockholders' property can not be taken until the corporate property is exhausted. *Id.*

22. *Necessary joinder of corporation.*—An action for labor debts brought under act 113 of 1877, can not be maintained against stockholders, unless joined with the corporation as co-defendants. *Thompson v. Jewell*, 59

23. *Failure to deny personal liability.*—In an action against a corporation, in which certain persons are summoned as stockholders, the omission by them to file an answer specifically denying the allegation that the corporation had omitted to comply with the requirements of the statute, whereby the stockholders were made liable for the corporate debts, does not operate as an admission of that fact. *Taylor v. New England Co.*, 107

24. *The burden is upon the plaintiff* to show that the persons whom he has summoned as stockholders are liable for the payment of the debts of the company. *Id.*

25. *Personal liability of outgoing stockholder.*—One who had ceased to be a member of a corporation at the time a judgment against it was rendered, can not afterward be held liable as a stockholder of the corporation in suit upon the judgment. *Id.*

See RECEIVER, 7; STOCK, 1, 2.

PERSONAL PROPERTY.

1. *Rule as to severed personalty.*—Personal property left on the land for the purpose of being used on the premises, passes with the land by the deed; otherwise with property severed from the realty and intended to be removed. *Noble v. Syltcester*, 62

2. *Application of the rule.*—A stone split out from the ledge and intended for the construction of a tomb, left lying on the land more than thirty years after sale of the land, held the personal property of the vendor. *Id.*

3. *Parol proof of exception—Continued assertion of claim.*—Property so severed and converted does not need to be specially excepted in the deed conveying the land; and the fact that a parol exception was made of such stone, was properly shown, as well as the statements of the party claiming to own the stone, when there was nothing in the position of the stone itself to show whether it belonged to that class of property which would, or of that class which would not, pass under the deed. *Id.*

PERSONAL PROPERTY. *Continued.*

4. *Split stone lying on land, sold during statutory period.*—In 1861. plaintiff bought a piece of land on which were lying some split stone belonging to a third party. They remained there untouched without assertion of title thereto by any party until six or eight years after the conveyance, when the owner entered and removed them. *Held*, that they remained the property of the original owner in the absence of any conversion or assertion of dominion by the vendee of the land in the meantime. *Baker v. Chase*, 66

5. *Right to remove personalty from land granted.*—The vendor of land on which remains some of his personal property, or the vendee of such personal property, has a right to a reasonable time in which to enter and remove the same; and if he delay beyond a reasonable time he is liable to nominal damages for his entry for such purpose. *Id.*

PIPE LINE—See RAILROAD, 6.

PLACERS—See LOCATION, 11.

PLEADING AND PRACTICE.

1. *Separate actions.*—A perfected claim for labor will not support separate actions for the different amounts into which it may be divided even though portions of it have been assigned and the division of the claim corresponds to the periods for which the labor was hired. *Mitroy v. Spurr Mtn. Co.*, 53

2. *The case must support the specific relief prayed for.*—When some specific relief is prayed, and is not accompanied with a prayer for general relief, if the whole case made will not justify the granting of the particular relief applied for, the bill must be dismissed, although the complainant may have been entitled to some other aid. *Laird v. Boyle*, 82

3. *Implied denial of title with implied concession of the trespass.*—Where plaintiff sued for damages on account of the deposit of tailings upon his claim, and the answer averred that the alleged claim of plaintiff was public mineral land, and denied that the defendant *wrongfully* deposited the tailings. *Held*, that such answer was an implied admission of the flow of tailings but a denial of the plaintiff's title. *Wood v. Richardson*, 121

4. *Instruction assuming disputed facts.*—Where title in plaintiff is denied, an instruction speaking of the "land of plaintiff" or "plaintiff's land," recites as admitted the contested fact, and is erroneous. *Id.*

5. *Denial of unlawful breaking of ditch.*—Where the fact that defendant "wrongfully" broke a flume is denied, the fact that he broke it is admitted and no proof of breaking is required; and conceding plaintiff's right of property in the flume would entitle him at least to nominal damages upon the pleadings. *Feely v. Shirley*, 132

6. *Error without injury.*—Erroneous instructions are no ground of reversal when it is apparent that the verdict would have been the same with correct instructions. *Green v. Ophir Co.*, 140

7. *If a plaintiff is entitled to a verdict*, on the evidence, erroneous instructions on the law can not prejudice the defendant. *Id.*

8. *Joinder of counts.*—A count for money had and received, may be

PLEADING AND PRACTICE. *Continued.*

joined with a count upon the deceit where the liability under either grows out of the same transaction. *Woodbury v. Deloss*, 144

9. *By pleading over, after demurrer overruled*, plaintiff waives all right to arrest of judgment for insufficient declaration. *Quincy Co. v. Hood*, 148

10. *The primary object of pleading* is to apprise the opposite party of the nature of the plaintiff's claim, or the defendant's defense; in other words, to apprise the opposite party of what he will be called upon to meet upon the trial. *Id.*

11. *Every essential fact issuable*.—It is an elementary rule of pleading that every fact essential to a cause of action is issuable, and must be proved upon the trial substantially as alleged, unless admitted by the defendant. *Id.*

12. *Duplicity in pleading* is bad upon special demurrer. *Munro v. King*, 160

13. *Answer can not vary legal effect of contract*.—Allegations in an answer, so far as they attempt to vary or contradict the terms or import of an admitted written contract between the parties set forth in the petition, are mere nullities; and it is not error for the court to exclude evidence offered in support of them. *Fort Scott Co. v. Sweeney*, 166

14. *Verdict for plaintiff, when may be directed*.—Where neither the answer nor the evidence offered in support thereof, nor both together, amount to a defense, it is no error for the court to instruct the jury to find for the plaintiff. *Id.*

15. *Special demurrer to bill good in substance*.—Defects in form in a bill in equity can not be reached by a general demurrer. The bill, though objectionable in form, must be sustained, if it show a case for equitable relief. *Glidden v. Norvell*, 170

16. *The material allegations in a complaint* for partition of real property which are not denied by the answer, are deemed admitted for the purposes of the trial. *Hughes v. Devlin*, 242

17. *Findings, how corrected*.—If the findings of the court are defective in omitting to find a material fact, the party aggrieved should move to correct them; and if any fact is found contrary to the evidence, it should be specified in a motion for new trial. *Pralus v. Jefferson Co.*, 473

18. *Sufficient findings of fact*.—A general finding by the court that "all the allegations and averments in plaintiff's complaint are true, and that all in the answer are untrue," is sufficient and conclusive of all the material issues made by the pleadings. *Pralus v. Pacific Co.*, 478

19. *Findings not disturbed*.—Findings will not be disturbed if the statement on motion for new trial entirely fails to specify the particulars wherein the evidence is insufficient to justify, or contrary to, the findings. *Id.*

20. *Plea in equity defined*.—A plea in equity is a special answer, only allowed when it puts the matter upon some *one point* which is decisive of the controversy. *Carter v. Hoke*, 579

21. *The Supreme Court can not re-inquire* into questions of fact and of credibility already passed upon by a jury. *Curtin v. Munford*, 585

PLEADING AND PRACTICE. *Continued.*

22. *Consideration of the opinion of the judge below.*—If the opinion of the president of the court below is filed of record, with the reasons, the court above in error are bound to notice it, though it do not appear to have been filed at the request of either party. *Brown v. Caldwell*, 674

23. *Judgment, when not reversible.*—A party can not reverse a judgment on an answer of the court below favorable to him, or on an answer to an abstract question. *Id.*

24. *Bill of exceptions when there is controversy* as to weight, effect, or admissibility of evidence, should set forth the evidence given or offered at length, and contain an averment that such evidence was all that was given or offered. When there is no dispute as to the facts, it is sufficient for the bill to state that such facts were proved. *Knoullon v. Culver*, 682

See ABANDONMENT, 3; AMENDMENT; APPEAL; CONTINUANCE; COSTS; ERROR, 1; FRAUD, 1, 6; INJUNCTION, 7, 8; INSTRUCTIONS; JUDGMENT, 3; NEGLIGENCE, 1, 5; NEW TRIAL; PARTIES; PERSONAL LIABILITY; PROCESS; VARIANCE.

POSSESSION.

1. *Possession as a question of fact.*—The evidence of plaintiff in ejectment for claims 16 and 17 west, on the Gregory lode, tended to show possession in, and occupation by himself and his grantors, from 1860, until forcibly dispossessed in 1865. The evidence also tended to show possession in defendant's grantors as early as 1860, leaving the question of priority of possession, however, involved in doubt. Two juries had found successive verdicts for plaintiff. *Held*, that the judgment would not be disturbed; the verdict not appearing to be clearly unsupported. *Jackson v. McMurray*, 164

2. *Possession extends to bounds claimed in title papers.*—A deed not giving boundaries, but reciting a location certificate in which a full and definite description is contained, will extend the possession to the entire claim described in such location certificate. *Harris v. Equator Co.*, 178

3. *Possession proved by admissions.*—In trespass for breaking and entering the plaintiffs' mine and taking coals, evidence of working by the plaintiffs in another part of the same mine within eighty yards of the place of the alleged trespass, coupled with a statement by the defendant that he had got the coal and was willing to pay such amount as should be settled by arbitration: *Held*, evidence of the plaintiffs' being in possession of the place where the trespass was committed. *Wild v. Holt*, 182

4. *Mining amounts to possession—Disseizee may not recover mesne profits before re-entry.*—Defendant entered upon a tract of land under claim of title and removed iron ore therefrom, from time to time, to supply an adjoining furnace, but without any actual inclosure or residence thereupon. On this state of facts it was *held*, 1. That such entry and removal of ore constituted an actual possession and defeated the constructive possession of the true owner. 2. That the owner was entitled to damages in trespass for the disseizin, but not for subsequent injuries to the freehold, till he had recovered possession. *West v. Lanier*, 184

POSSESSION. *Continued.*

5. *Working one seam, evidence of possession of overlying seam.*—Where a party had claim and color of title to all the coal in a certain tract, evidence of his working one bed may be given for the purpose of showing title by possession to an overlying bed on the same tract. *Turner v. Reynolds*, 190

6. *Certificates of stock to prove possession.*—Plaintiffs, in ejectment for mining ground, were an ordinary joint stock company, or partnership, claiming by purchase and transfer from the company originally locating the claims; the practice of the company was to issue to members certificates of stock, which certificates constituted the only evidence of membership recognized by the company. Transfers were made by assignment of the certificates. *Held*, that these certificates and their assignments, their execution first being proved, were competent and proper evidence to prove possession. *Pennsylvania Co. v. Owens*, 211

7. *Prior possession without location.*—Though the regular and usual way of obtaining possession of mining claims be according to the mining regulations of the vicinage, still a prior possession, not so taken, is good as against one subsequently taking possession in the same way. *English v. Johnson*, 202

8. *The acts required as evidence of the possession of a mining claim* are those usually exercised. A miner is not required to reside on his claim, nor build on it, cultivate nor inclose it. He may hold possession himself or by his agents or servants. *Id.*

9. *Pedis possessio.*—Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy, or work done, be only on a part. The rule which applies to agricultural lands, and requires a more strict interpretation of a *possessio pedis*, does not apply to mines. *Id.*

10. *Possession without proof of location.*—A plaintiff need not show, in ejectment, in the first instance, that he had a possession taken in accordance with local laws, but may rely upon proof of the possession alone, until defendant shows that such possession was wrongful. *Id.*

11. *Possession of land as title.*—A party in possession of public mineral land is entitled to hold it as against all the world—the government excepted, if the land belong to it—subject only to the qualification that upon land taken up for other than mining purposes, a right of entry for such purposes may attach. *Lentz v. Victor*, 212

12. *Possession good till better right shown.*—One in the actual possession of real estate may rely on his possession alone until the opposite party shows a better right. *Hawthurst v. Lander*, 214

13. *Prior possession superior to statutory right.*—Proceedings in accordance with the statute, to acquire a possessory right to land, would not give a right to recover their possession as against one who was then in the actual possession of it. *Id.*

14. *Actual occupancy of part of claim.*—One who claims a tract of mining ground for mining purposes on the public domain, but is actually occupying and working only one portion of it, can not recover damages for an entry by a stranger upon the tract beyond his actual occupancy, unless his

POSSESSION. *Continued.*

boundaries were plainly indicated by marks or monuments, or there was some local mining custom allowing his possession to extend to the ground upon which the entry was made. *Hess v. Winder*, 217

15. *Constructive possession of claim under deed*.—One who enters upon a part of a mining claim under a deed, does not by the deed alone acquire a constructive possession to the entire claim unless the deed contains definite and certain boundaries which can be located, marked out and made known from the deed alone. *Id.*

16. *Priority gives the better title*.—Where the title of the respective parties to public mineral lands is based on possession alone, the older possession, as between the two, gives the better right, although the younger possession was for mining purposes. *Gibson v. Puchta*, 227

17. *Previous mining by strangers*.—When there is a question of priority between a mining claim and an agricultural claim, proof that the lands had been previously occupied for mining purposes by parties with whom or whose title the present claimants of the ground for mining purposes do not pretend to connect themselves, is of no avail to the present claimants. *Levaroni v. Miller*, 232

18. *A constructive possession* is sufficient to maintain trespass. *Courchaine v. Bullion Co.*, 235

19. *Possession good against wrong-doer*.—Actual possession of real estate, even though wrongful, is sufficient to support an action of trespass *quare clausum fregit* against a mere stranger or intruder, but not against the rightful owner. *Id.*

20. *Possession yields to title—Paramount proprietor*.—As between claimants, neither of whom deraign a legal title from the United States, priority of possession must prevail; but where one party holds a title from the paramount proprietor, it must prevail against a title which has never been recognized by a grant of any kind. *Id.*

21. *Actual possession on opposite sides of disputed gore*.—Where the ground in dispute was a gore of land, practically unoccupied by either party, but each party working on the undisputed ground on either side, it was held, that the following instruction—"where two mining companies take up adjoining claims, and the one last taken up overlaps the other, and neither company is working that portion of the claim which overlaps the other, but are working in different portions of their respective claims, the fact that the locators of the last claim located have been in possession of their claim for five years, does not divest the owners of the first claim of the right to their claim to the extent of the original boundaries, and such a possession by the locators of the last claim located is not adverse to the possession of those who located the first claim"—correctly declared the law, and should have been given. *Maine Boys' T. Co. v. Boston Co.*, 247

22. *Possession as evidence of title against trespasser*.—In actions of ejectment, or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction is *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient. *Campbell v. Rankin*, 257

23. *Entry upon another's possession, when wrongful and when al-*

POSSESSION. *Continued.*

locable.—A person who knows that a mining claim is in the actual possession of another can not honestly believe that it is vacant and subject to entry and re-location; an entry made under such circumstances can not be in good faith, unless upon some claim of legal right. Actual possession in another is *prima facie* evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right; but one who has a title and present right of possession, may always take peaceable possession of what he claims to be his own. *Phenix Mill v. Lawrence*, 261

24. *Title prior to record*.—While holding possession, for the purpose of making the development required by law, the locator's right to the lode is complete, and it can not be conveyed except by deed. *Murley v. Ennis*, 360

25. *Idem—Abandonment*.—It may nevertheless be lost by abandonment, or yielding possession to another, which is the same thing. *Id.*

26. *Idem—Admitting new party into possession*.—And so if the locator admits another into possession with him, this will amount to an abandonment *pro tanto*, and a retaking by the party admitted, upon which they will become interested in the lode, jointly or otherwise, according to the terms of their agreement. *Id.*

27. *Idem—No distinction as to re-located claim*.—In these particulars the rule is the same when applied to the location of an abandoned claim. *Id.*

28. *Possession as proof of title*.—The possession of agricultural land is *prima facie* proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge v. Smith*, 448

29. *Prospect holes do not amount to actual possession*. *Pralus v. Jefferson Co.*, 473

30. *Constructive possession under district rules*.—There can be no constructive possession of mining claims upon the public domain except under district rules. To establish such constructive possession there must be proof that there are such rules in force in the particular district, what the requirements of the rules are, and that they have been complied with. *Id.*

31. *Domestic occupation not evidence of possession as mineral land*.—Proof of a dwelling house and blacksmith shop do not tend to show possession of land as mineral ground, and evidence of such fact is properly excluded in a suit for placer mining ground in support of an adverse claim. *Moron v. Wilkinson*, 602

32. *Scrambling possession*.—Two parties can not be in possession of the same lead ore diggings holding adversely to each other, the one rightfully, the other tortiously. *Ecker v. Moore*, 686

See ADVERSE CLAIM, 1; EJECTMENT, 1, 4; LOCATION, 1; QUIET TITLE, 6, 7.

PRESCRIPTION.

1. *Estate distinguished from easement.*—The right to a given stratum of coal under a certain close is a right to land, and can not be claimed by prescription: *aliter* of a right to take coal in another man's land. *Wilkinson v. Proud*, 269

PROCESS.

1. *Constructive service of summons.*—A party relying solely upon a constructive service of summons is bound to prove a strict compliance with some of the modes prescribed by the statute for obtaining such service. *Scorpion Co. v. Marsano*, 502
2. *Service of summons on business manager.*—Where the officer certifies that he served the summons upon the business manager of a corporation. *Held*, not a compliance with the provisions of the statute requiring the service to be upon the managing agent. *Id.*
3. *Idem.*—Courts must know, and officers must be presumed to know, what the legislature meant by the term "managing agent;" but courts can not know what an officer means by a designation unknown to the law. *Id.*
4. *Publication of summons—Deposit in postoffice.*—Where a party relies upon the publication of summons, it is necessary not only to publish a copy, but to deposit another copy in the postoffice, directed to the defendant at his place of residence, if known; and the statute prescribes that such deposit shall be proved by affidavit. *Id.*
5. *Deposit in postoffice must be addressed to the defendant.*—In a suit brought against the Scorpion Silver Mining Company, a corporation, where the justice of the peace deposited a copy of the complaint and summons in the postoffice, addressed to "Robert Apple or W. H. Martin, San Francisco, California," and there was no evidence at the time of such deposit before the justice that either Apple or Martin was connected with the corporation in any capacity whatever. *Held*, not a compliance with the law, which required the summons to be directed to the defendant. *Id.*

PROSPECTING CONTRACT.

1. *Outfitters and adventurers—Distribution of profits.*—Scott, in 1849, paid money into the treasury of a company outfitting for California, to entitle Clark to membership therein, upon agreement that he, Scott, "should have a full half share of all that Clark is entitled to by being a member of said company." The company proceeded to California, where, on April 10, 1850, just one year after starting, they dissolved by, unanimous vote, their original rules providing that they should not dissolve until after one year, nor until return to the "United States," but also providing for amendment by a two thirds vote. Upon dissolution a dividend of \$1,780 per man was declared. The various members then took up new claims, more or less in concert, but not as a company. Clark made a profit also out of these claims. Upon his return, Scott claimed one half of what Clark had received, both before and after the dissolution. *Held*, that the dissolution was valid under the amendment clause, and that plaintiff was entitled to one half of the \$1,780 only, after deducting \$500 to cover defendant's return expenses. *Scott v. Clark*

PROSPECTING CONTRACT. *Continued.*

2. *Profits after disbanding.*—While the company was in existence and working an old claim, they located a new claim, but were only able to do enough work to hold it, the season not permitting active mining; after the dissolution Clark worked this claim and cleared \$1,000, which was held not within the contract. *Id.*

3. *Prospector engaging in other business.*—Where a number of individuals formed an association for a specified term to engage in mining for gold in California, and one advanced money and the others agreed to proceed to the mines and engage in the digging for gold, but when they arrived, the capital advanced being exhausted, all abandoned the enterprise as fruitless, and two of them engaged in another and different employment of their labor, it was *held* that the associate who advanced the money had no such specific lien on the profits produced by such labor, as could be enforced in a court of equity. His remedy, if any he had, was by an action for damages against those who abandoned the association. *Waring v. Cram,* 280

4. *Traveling expenses on prospecting adventure.*—Defendant, in consideration of \$500 paid him by the plaintiff, agreed to go to California and there labor to the end of the current year, 1850, and in 1851 so long as to give him a reasonable time to reach home by December 1, 1851, there to divide the avails of the expedition. *Held*, that defendant could not deduct from these avails the expenses of his journey home, if he delayed returning an unreasonable period, but that the time up to which he must account was to such a period prior to December 1st as would have enabled him to reach home by that date. *Thompson v. Prouty,* 290

5. *Consideration of the items* to be allowed on such accounting, as to wearing apparel, the original advance of \$500, etc. *Id.*

6. *Infant can not rescind executed contract.*—An infant, in consideration of an outfit to enable him to go to California, agreed, with the assent of his father, to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterward sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was *held* that he could not rescind the agreement, and recover back the amount so sent, deducting the amount of the outfit and any other money expended for him by the other party in pursuance of the agreement. *Breed v. Judd,* 293

7. *Liquidated damages for breach of contract.*—Where the damages resulting from the breach of a prospecting contract are in their nature entirely indefinite and uncertain, and the prospector at the time of executing the agreement also gave a bond that in case he failed to keep his agreement he would pay \$500 as liquidated damages for the breach. *Held*, that such sum will be regarded, not as a penalty, but as the measure of damages, unless the amount be greatly disproportioned to any probable estimate of the actual damages. *Cottheal v. Talmage,* 299

8. *Idem*—Where it may count against one of several breaches.—Such sum will still be treated as liquidated damages, although by the terms of the agreement it is to be paid on the breach of any one of several stipula-

PROSPECTING CONTRACT. *Continued.*

tions of different degrees of importance, when the damages arising from the breach of either of them would be in their nature indefinite.

9. *Time fixed by context of contract.*—Defendant Smith agreed with plaintiffs in consideration of a fund in money advanced, to sail for California, to forward provisions for two years and tools for digging gold, and to commence digging as soon as possible on arrival, and remit to plaintiffs one fourth of the proceeds. *Held*, that the contract bound him to dig for gold for the full period of two years. *Hoyt v. Smith*, 306

10. *Prospector embarking in other business obliged to a discovery.*—Upon bill for an account filed, alleging that defendant Smith had procured large sums either by digging gold or by the use of the funds of plaintiffs, which sum he had fraudulently shipped to defendant Newman. Smith answered, stating that he had abandoned digging for gold, but refused to answer interrogatories as to what gold he had otherwise obtained during the period of two years called for in the contract. *Held*, that he was bound to make full disclosures of what he made and of what business he was engaged in, so that upon knowledge of the facts the court could say whether the money was realized by digging gold or procuring others to dig for him, or through an investment of the funds advanced him, or otherwise. *Id.*

11. *Gold digging contract construed.*—A contract requiring a party to dig gold during a certain period, can not be construed to require the party making such agreement to account for money earned during the period called for in the contract in other business. *Hoyt v. Smith*. 315

12. *Amendment showing consideration for prospector engaging in other business.*—The Supreme Court having advised the dismissing of the bill in this case (*ante* 320) because the contract on which an account was sought called for the business of gold digging only, the complainant asked to amend by charging that the new business was engaged in in consideration of defendant being released from his agreement to dig for gold, which leave to amend was allowed; it was *held*, that such amendment was proper; that the subject-matter of the bill as well as the parties remained the same, and that delay was no reason for refusing to allow the amendment when such delay had been caused by the refusal of defendants to make timely disclosures under the interrogatories originally filed. *Hoyt v. Smith*, 321

13. *Consent to change of business.*—Where a party, who had engaged to dig for gold for the benefit of himself and the outfitting adventurers, engaged in other business during the period during which he was bound to be mining, with the consent of the outfitters to his quitting the mines and embarking in other business, *held*, that such consent was a sufficient consideration for the promise of such party to account for the profits of such other business. *Hoyt v. Smith*, 325

14. *Statement of terms of the prospecting arrangement—Holding, as to the relation of the parties—Unauthorized disbanding.*—Where several persons form an association, by the subscription of stock and the adoption of a constitution, to procure gold from the mines of California, and agree to send eight persons, to be selected from their number, to labor in obtaining such gold, under an agreement to furnish them with outfits

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10. *Prospector embarking in other business obliged to a discovery.*—Upon bill for an account filed, alleging that defendant Smith had procured large sums either by digging gold or by the use of the funds of plaintiffs, which sum he had fraudulently shipped to defendant Newman. Smith answered, stating that he had abandoned digging for gold, but refused to answer interrogatories as to what gold he had otherwise obtained during the period of two years called for in the contract. *Held*, that he was bound to make full disclosures of what he made and of what business he was engaged in, so that upon knowledge of the facts the court could say whether the money was realized by digging gold or procuring others to dig for him, or through an investment of the funds advanced him, or otherwise. *Id.*

11. *Gold digging contract construed.*—A contract requiring a party to dig gold during a certain period, can not be construed to require the party making such agreement to account for money earned during the period called for in the contract in other business. *Hoyt v. Smith*, 315

12. *Amendment showing consideration for prospector engaging in other business.*—The Supreme Court having advised the dismissing of the bill in this case (*ante* 320) because the contract on which an account was sought called for the business of gold digging only, the complainant asked to amend by charging that the new business was engaged in in consideration of defendant being released from his agreement to dig for gold, which leave to amend was allowed; it was *held*, that such amendment was proper; that the subject-matter of the bill as well as the parties remained the same, and that delay was no reason for refusing to allow the amendment when such delay had been caused by the refusal of defendants to make timely disclosures under the interrogatories originally filed. *Hoyt v. Smith*, 321

13. *Consent to change of business.*—Where a party, who had engaged to dig for gold for the benefit of himself and the outfitting adventurers, engaged in other business during the period during which he was bound to be mining, with the consent of the outfitters to his quitting the mines and embarking in other business, *held*, that such consent was a sufficient consideration for the promise of such party to account for the profits of such other business. *Hoyt v. Smith*, 325

14. *Statement of terms of the prospecting arrangement—Holding, as to the relation of the parties—Unauthorized disbanding.*—Where several persons form an association, by the subscription of stock and the adoption of a constitution, to procure gold from the mines of California, and agree to send eight persons, to be selected from their number, to labor in obtaining such gold, under an agreement to furnish them with outfits

PROSPECTING CONTRACT. *Continued.*

and money for their expenses, and on their return to have an account and division of the articles of value which they may acquire—*held*, that the persons thus selected to labor for the association, though members, stood also in the relation of employes of the association, and their refusal, after arriving in California, to work together, and the partition among themselves of the property of the association with a view of aiding their separate and independent labors, do not work a dissolution of the association, nor discharge them from the obligations to it under their contract.

Eagle v. Bucher,

230

15. *Idem*—*Prospector can not sever his relation at will.*—Such act of separation and abandonment of duty exonerates them from liability to each other, but not to the association. *Id.*

16. *Idem*—*Prospector compelled to account*—*Election of remedies against him.*—It is competent for such association to compel an account and payment by either of the eight, of his earnings while thus working separately, in favor of the other members of the association, or to sue either of them for a breach of his contract, at its election. *Id.*

17. *Idem*—*Prospector not accounting, excluded from distribution.*—In taking a decree against one of such laborers for the proportion of his earnings which is due to the association by the terms of the contract, all of the eight should be excluded from the distribution except those who render an account, pursuant to the articles of association. *Id.*

18. *Abandonment of adventure by associates—Obligations to outfitter.*—Defendant, by indenture, in consideration of an outfit furnished by plaintiff, covenanted to join a party about to go to California, and to give plaintiff one half of his net earnings for two years, and to remain with the company for that time. The defendant did go with the company, which, shortly after arrival, dissolved by a majority vote of its members without fault of the defendant and against his consent. After the dissolution defendant worked on his own account, but as the plea stated, earned nothing beyond his living. *Held*, that there was no undertaking on the part of defendant that the company should continue two years, and that upon its disbanding without his fault he was released from further obligation. *Harvey v. Coffin,*

336

19. *Contract for share of net earnings construed—Prospector not liable for unavoidable losses.*—P. agreed to furnish B. with passage money and funds to go to California, not to exceed \$175, and in consideration therefor B. agreed to occupy a specified period from the date of his arrival in San Francisco in digging gold, or in such other business as he should deem most profitable, and to pay one third of his net earnings during said period to P. About the expiration of the period B. sold the whole property which he had acquired, viz., a mill, for \$1,000, taking the note of the purchaser, who was then reputed to be good, in payment. Afterward the purchaser became embarrassed, and B. accepted two bonds of the S. F. C. Co., then reputed to be worth par, in settlement for the note, but the bonds became worthless. *Held*, that if in these transactions B. was in good faith endeavoring to convert his profits into cash, and in so doing and without fault met with the losses which prevented him from

PROSPECTING CONTRACT. *Continued.*

realizing any net profits, he was not liable for any earnings on the contract. *Pierce v. Bucklin*, 340

20. *Oil prospecting contract—Suspensive and potestative condition.*—An agreement was made between plaintiffs, the owners of mineral lands, and the assignor of defendants, of a two-fold character, including a license to mine, and a lease for ten years in case of successful discovery. The defendants lost all rights thereunder by lapse of time, no workable quantity of petroleum having been discovered within the period limited by the contract. Plaintiffs then agreed to refrain from declaring a forfeiture provided defendants would carry on the search for petroleum constantly, and without cessation. *Held*, that the latter agreement was conditional; that its condition was suspensive and potestative, and that when the defendants ceased to carry on their search for petroleum the plaintiffs were entitled to declare the forfeiture of the contract by suit, and claim possession of the lands without a formal putting in default. *Escoubas v. Louisiana Co.*, 344

21. *Prospecting partnership construed.*—Plaintiffs furnished to certain miners money and provisions, in consideration that the miners would locate claims for the plaintiffs when they made a discovery. *Held*, that this contract constituted a mining partnership within the meaning of the following district rule: "That no claim shall be recognized as legally held unless the prior claimant has personally pre-empted the same, with the exception of three claims allowed the discoverers for their prospecting partners." *Held further*, that plaintiffs could maintain an action for the possession of a claim located for them in pursuance of such contract. *Boucher v. Mulverhill*, 350

22. *Prospecting contract no commercial partnership.*—A mining prospecting partnership is not governed by the technical rules of the law of commercial partnership. *Id.*

23. *Contract for report upon mines construed—Expenses of agent employed to advise on investments.*—Duff, the plaintiff, and five defendants, signed an agreement under which, in connection with a letter of advice, plaintiff went from Boston to California to search for and report upon mining property. Upon his recommendation mines were to be purchased by the six parties and he was to be the superintendent; \$500 were advanced him for expenses. While absent looking for properties and after having advised on several he was notified by telegraph that the whole scheme was abandoned. *Held*, that the plaintiff was entitled to recover five sixths of his reasonable expenses, and also five sixths of the reasonable value of his services, although the sum should exceed the amount raised by the payment of \$100 each by the subscribers. *Held also*, that the objection that a partner can not recover compensation for his services in the joint business was not applicable to this case. *Duff v. Maguire*, 353

24. *Prospecting contract need not be in writing.*—An agreement between two or more persons to explore the public domain and discover and locate lodes for the joint benefit of all is not within the Statute of Frauds, and it is not necessary that it should be written. *Murley v. Ennis*, 360

25. *Remedy when prospector has transferred the entire title.*—If one

PROSPECTING CONTRACT. *Continued.*

in possession of a lode, holding for himself and another, make a sale of the property, the latter may bring ejectment against the purchaser for his part, or he may affirm the sale and sue his associate *in assumpsit* for his part of the purchase money. *Id.*

26. *Outfitter failing to keep up supplies, the prospector may abandon.*—If two persons agree with a third to furnish necessary supplies to the latter as the same shall be required for discovering and locating lodes for the joint benefit of all, the latter may treat this as a condition precedent, and upon failure to furnish the supplies he may abandon the enterprise, or he may proceed to discover and locate lodes in his own right, without regard to the contract. *Id.*

27. *Adequacy of consideration in prospecting contracts.*—Considering the uncertain nature of undeveloped mineral land, a contract to prove it at the prospector's sole cost, which he loses if no mineral be found, he to receive a conveyance of three fourths of the land if mineral is found, would not be unreasonable. It is the prospectors who take the greater risk. And a contract whereby the owner agrees beforehand to sell to the prospector at a certain sum in case mineral be found, is just and reasonable, although such sum appears after the discovery is made to be much less than what the mine discovered is really worth. *North Ga. Co. v. Latimer,* 387

28. *Facts of the case—Stock.*—A land owner entered into a contract by which his land was to be prospected for copper. If a copper mine were found equal to the Ducktown mines, he agreed to take \$50,000 for the land or more or less as it might be estimated to be better or worse than the Ducktown mines. After the mine was found he agreed to convey to a company, he taking his pay in \$75,000 out of the \$300,000 capital stock. *Held,* that the risk assumed and outlay expended by the prospector, were adequate consideration for the land owner thus parting with three fourths of his interest. *Id.*

29. *Nature of prospecting contract.*—An agreement to engage in the business of prospecting for and the development of lode mining property, for the joint use of all, is in the nature of a partnership agreement, and under such an agreement each party thereto becomes the agent of the other. *Lawrence v. Robinson,* 387

30. *Determinable at pleasure.*—Where no time of duration is limited by such agreement, it is determinable, under equitable restrictions, at pleasure; but such determination can not operate to defeat rights accrued under it while it was in force. *Id.*

31. *Form of complaint by outfitter against prospector, set forth at length in statement.* *Id.*

32. *"Grub Stake" contract—Arrangement must continue to time of discovery.*—The partnership association, or association between parties who may be engaged in prosecuting explorations on the public lands for mines, must exist at the time of the location and discovery in order to give the parties, other than the discoverer, an interest in the property. *Johnstone v. Robinson,* 396

33. *Same prospector contracting with third party.*—A made an

PROSPECTING CONTRACT. *Continued.*

agreement with B, by which the latter was to take care of the former for the winter, and furnish outfit in the spring, when A should go prospecting on their joint account. B, at least partially, complied with the agreement, by keeping A for the winter and furnishing some money in the spring. But before making any search for mines under this arrangement, A made a new arrangement with R, by which the latter furnished the "outfit," and the former did the prospecting; under this last arrangement the mines were discovered. *Held*, that the making of the arrangement with R was an abandonment of the agreement with B, and that the latter could not share in the interest of A in the property discovered and located under the new arrangement. *Id.*

34. *Prospecting contracts specifically enforced.*—Plaintiff showed float which he had found to defendant and defendant commenced to prospect for the lode upon joint account, and when he had found it he recorded it in his own name. Upon findings by the jury to this effect, decree for conveyance was affirmed. *Sears v. Collins*, 400

PROSPECTUS.

1. *Misrepresentations not relied on.*—Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them, and had had opportunities of judging of their accuracy. *Held*, that he was not entitled by reason of them to have the contract rescinded. *Jennings v. Broughton*, 405.

2. *Departure from prospectus—Enjoining action for calls.*—A company was formed for mining purposes; the prospectus referred to the memorandum and articles, and described in favorable terms a mine for the purchase of which a contract had been entered into. This mine was afterward found to be worthless, and the directors rescinded the contract, and agreed to purchase another. *Held*, that a shareholder who had subscribed on the faith of the prospectus, was entitled to an injunction against an action for calls, although the directors had been themselves deceived, and had been guilty of no willful fraud. *Smith v. Reese River Co.*, 415

PUBLIC DOMAIN.

1. *Ownership of mines not a right of sovereignty.*—The minerals of gold and silver which passed by the cession of California to the United States, were not held in trust for the future State, nor did their ownership vest in the State of California upon its admission into the Union. The ownership of the precious metals is not one of the rights of sovereignty which the United States holds in trust for the States; nor is it essential to the sovereignty of a State that she should own the gold and silver mines within her borders. *Moore v. Smear*, 418

2. *Sovereignty and prerogative distinguished.*—By the common law, the right to mines of precious metals was not an incident of sovereignty, but a personal prerogative of the king, which could be alienated at pleasure; and this privilege is not one of the incidents of the sovereignty of a State. *Id.*

3. *President no power to let mines.*—The president, by virtue of his
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PUBLIC DOMAIN. *Continued.*

office, and independent of statutory authority, has no power to lease the lead mines on the public domain. *Lorimier v. Lewis*, 437

4. *Statutory precedence of miner's rights.*—By statute in California a person who settles for agricultural purposes upon any of the mining lands of the State, settles upon such lands subject to the rights of miners, who may proceed in good faith to extract any valuable metals to be found in the lands so occupied by the settler in the most practicable manner in which they can be extracted, and with the least injury to the occupying claimant. *McClintock v. Bryden*, 443

5. *Mineral land excepted in pre-emption acts.*—Neither the act of 1858, as to the location of seminary land, nor the act of Congress donating it, allows mineral land to be located. *Burdge v. Smith*, 448

6. *Presumption that land is public.*—The presumption under our statute is that all land in the State is public land until the legal title is shown to have passed from the government to private parties. *Id.*

7. *Idem—Presumption from possession.*—This presumption is reconcilable with the presumption of title arising from possession. *Id.*

8. *"Vested rights" construed.*—When a statute provides for the protection of vested rights, it means rights lawfully vested, and this excludes the protection of locations of salines, which are reserved from sale or entry. *Morton v. Nebraska*, 451

See SALINES, 1.

QUARRY.

1. *Face of quarry necessarily irregular.*—A stipulation in a lease of a quarry of a horse shoe shape, and having faces on the northwest, north, east and southeast sides "that said quarry shall be worked as the face is now opened," is not violated by quarrying one of the faces to a greater extent than another, and such quarrying will not be enjoined if the same general shape is preserved. *Keeler v. Green*, 465

QUIET TITLE.

1. *A bill to quiet title will lie in favor of the possessor of a ditch,* against one claiming title by virtue of the sale of the same, upon proceedings under the mechanic's lien act, alleged by the plaintiff to be illegal, aside from any question of fraud. *Head v. Fordyce*, 470

2. *What amounts to cloud.*—A decree alleged to be supported by a lien elder to plaintiff's title, is a cloud upon such title. *Id.*

3. *Any description of claim* may be the subject of a cloud on title, and is relievable by bill to set it aside. *Id.*

4. *General rule as to the right to bring the action.*—Plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property. *Id.*

5. *Burden of proof on plaintiff—Insufficient findings.*—A plaintiff seeking to set aside a decree foreclosing a lien as a cloud upon his title, must show affirmatively that defendant had no claim on the property, and if the findings are insufficient for the court to determine whether the defendant had any lien, the judgment in favor of plaintiff will be reversed that the cause may be fully tried. *Id.*

QUIET TITLE. *Continued.*

6. *Possession of claim necessary to maintain action.*—In order to maintain an action under the Practice Act, § 254, to quiet title to a mining claim upon the public domain, the plaintiff must establish his possession, either actual or constructive, at the time of the commencement of the action, and a complaint which fails to aver such possession is demurrable. *Pralus v. Jefferson Co.*, 473

7. *A possessory title is sufficient to maintain an action to quiet title to a claim upon the public domain.* *Pralus v. Pacific Co.*, 478

8. *Idem—Sufficient averment of injury.*—In such action an averment that plaintiffs were greatly embarrassed in the enjoyment of their mining claim and their interest therein greatly depreciated by reason of the possibility of there being title in the defendant as he falsely asserted, is a sufficient averment of injury under the statute, to sustain the action. *Id.*

9. *Tenant in common against co-tenant.*—One tenant in common of a mining claim, in actual possession, may maintain an action, under the Practice Act, to determine the validity of an adverse title purchased by a co-tenant. *Ross v. Heintzen*, 483

10. *Facts of the case—Sale of co-tenant's interest—Partnership debts.*—A mine and mill were owned and worked in partnership by M. and S., who held two thirds, and C. and Y., who held the other third; M. and S. conveyed by deed their two thirds interest to plaintiff, who at once took their place as co-tenant in possession, but paid only a small part of the purchase price. At the date of such conveyance the company was indebted, and upon such indebtedness judgment was obtained against all the original owners, and in due course their entire interest in the property was sold to the defendant by sheriff's deed. *Held*, in an action to quiet title brought by the grantee of M. and S., that he had acquired their original two thirds interest, and that the vendee at sheriff's sale acquired thereby only the one third interest of C. and Y. *Id.*

11. *Instrument capable of being used to vex title.*—Whenever an instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach it has been lost, or which may throw a cloud over the title, and he can not immediately protect his right by any proceedings at law, equity will afford relief by directing the instrument to be delivered up to be canceled, or such other decree as justice or the rights of the party may require. *Stewart's Appeal*, 491

12. *Defendant must plead and prove his title.*—In an action to quiet title under the statute, it is not necessary for the plaintiff to set out specifically the character of the adverse claim; the burden is on the defendant, if he admits plaintiff's possession, or does not disclaim, to plead and prove a good title in himself. *Scorpion Co. v. Marsano*, 502

See FORCIBLE ENTRY, 2.

QUO WARRANTO.

1. *Use of abbreviated name.*—The use of an abbreviated name, "Ophir, Copper, Silver and Gold Mining Company," instead of the real corporate name, "Ophir, Copper, Silver and Gold Mining Company of Placer County, California," is not a usurpation, and will not support a proceeding to oust it of its franchises. *People v. Bogart*, 512

QUO WARRANTO. *Continued.*

2. *Illegal election of trustees.*—An election of trustees of a corporation, at which all the stockholders are present, but a portion decline to participate, at which the president, though present, did not preside, and no president *pro tempore* was chosen, in total disregard of the by-laws, is illegal and void. *State v. Pettineli*, 513

3. *Illegal officer ousted by quo warranto.*—Upon an information in the nature of a *quo warranto*, if it appears that respondent is unlawfully exercising the office of trustee of a corporation, judgment will be entered that he be ousted and excluded from the office. *Id.*

4. *Quo Warranto to correct abuse of eminent domain.*—A coal mining company, in order to avail itself of the power of eminent domain, organized as a railroad corporation, nominally for the transportation of freight and passengers for the public use and benefit, but really for its private use in the transportation of coal from its mines, and by judicial proceedings condemned land which was the private property of the relator. *Held*, that the proceedings in condemnation amounted to an imposition upon the court, and that a demurrer to a complaint, in an action to annul the franchise and dissolve the corporation, which set forth the above facts, should have been overruled. *People v. R. R. Co.*, 518

5. *Idem—Relief through attorney general.*—It was competent for the State, upon discovering the misuse of its authority, to interpose by its attorney general to correct the abuse. *Id.*

RAILROADS.

1. *No right to surface support where company refuses to purchase minerals.*—A railway company, having purchased land for the purpose of their railway by agreement, and having taken a conveyance in the form given in the Lands Clauses Consolidation Act, and not being willing to purchase the minerals after notice of the owner's intention to work them, pursuant to Sec. 78 of the Railways Clauses Consolidation Act, 1845, is not entitled to the adjacent or subjacent support of the minerals; but the owner is entitled to get them notwithstanding that the getting of such minerals would cause the surface to subside. *Held* accordingly, that where, under such circumstances, the company had given notice that the working of the mines was likely to damage the works of the company, the owner of the minerals was entitled to recover compensation which had been assessed under the 78th section. *Fletcher v. G. W. R'y Co.*, 521

2. *A railroad held to pass on sale of iron works as an "improvement."*—A sheriff's sale upon an execution against the owners of iron works, under which were seized several tracts of land, with "the buildings, furnaces and other improvements thereon erected, known as the Shawnee Iron Works," passes to the purchaser a railroad used in connection with the furnaces, and extending therefrom across intermediate lots of other owners to the landing where coal and iron ore were usually delivered for the use of the furnaces, although the word "appurtenances" was omitted in the levy. *Wright v. Chestnut Co.*, 528

3. *Right of way goes with the road.*—Where a railroad passes to a sheriff's vendee as parcel of the works seized and sold, the right of way

RAILROADS. *Continued.*

which the owner of the tract had, passes to the purchaser from the sheriff. *Id.*

4. *Contracts with colliery made with reference to transportation—Price made dependent on freight.*—In a contract for the delivery of coal the colliery company stipulated for an advance in price, if any advance on freight and tolls accrued before a time fixed. The company had a right to be paid for any such increase by the most usual and ordinary mode. *Lovering v. Buck Mt. Co.*, 535

5. *Idem—Tender.*—The offer to furnish coal on the basis of the contract, including advance on freight and tolls, if refused, was a sufficient compliance by the company.

6. *Pipe line under roadbed.*—A railroad does not take the land condemned for its use in fee. This remains to the original owner, who may lawfully enter upon the roadbed and lay a pipe line for the carriage of oil under the railroad. *Hasson v. Oil Co.*, 547

7. *Injunction*—An interference with the exercise of such right may be prevented by injunction. *Id.*

8. *Condemnation of mining railroad by passenger line—Damages to ore bed.*—Where a railroad attempted to condemn as part of its roadbed a part of a shorter railroad, owned and used by the owner of an iron ore bed as an appurtenance to such ore bed, *held*: that confining the damages to the actual value of the land taken and the ties and track as at present laid down, was not that just compensation intended by law, and that if the ore bed and the remaining section of its railroad not taken were depreciated in value by such taking, the owner must be allowed damages for such depreciation. *In re Poughkeepsie R. R.*, 552

9. *Breach of covenant to remove railroad.*—If a railroad company covenants with the owner of land, upon notice, to remove the railroad to another location on the same land, so as to permit the coal thereunder to be mined, but upon notice refuses to perform its covenant, a specific performance can not be compelled, but the railroad will be liable in damages for the breach of its covenant. *Mine Hill R. R. v. Lippincott*, 555

10. *Idem—Measure of damages—Apportionment of damages between landlord and tenant.*—The measure of damages under such circumstances is the value of the coal left standing, so as not to let down the surface, and a verdict for these damages, *in solido*, may be apportioned by the jury between the landlord and tenant. *Id.*

11. *Facts of the case—Railway company mining and breaking barriers.*—Plaintiffs, owners of a coal mine, claimed damages against the owners of an adjoining mine for breaking down their barriers and working across the bounds. The wrongful acts were committed in 1863, while such adjoining mine was worked by the Hartlepool Railway Company. The boundaries of the two mines had been settled by mutual agreement in 1862, and after lengthy negotiations a mutual release was executed in 1864, by which all wrongful acts of both sides were condoned.

In 1863 an act of Parliament was passed, under which said Hartlepool Railway Company were to sell their mines within five years, and in 1865

RAILROADS. *Continued.*

it was amalgamated with the defendant company, and all its assets and liabilities transferred to them. *Held:*

12. *Mining ultra vires—Responsibility of corporate successor.*—1. That although it was *ultra vires* of the railway company to work mines, the act of 1863 implied that the company were to work their mines until sold, and that upon the amalgamation with the defendant company the latter became liable for the wrongful act of their predecessors.

13. *Breach of faith avoids release.*—2. That the wrongful acts committed in 1863 were not condoned by the release of 1864, the plaintiffs having no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken.

14. *Statute of Limitation, where facts not known.*—3. That the Statute of Limitations did not begin to run until the time of the discovery of the wrongful acts, there being no *laches* attributable to the plaintiffs for not having discovered the damage prior to 1870, two years before the filing of the bill. *Ecc. Com'rs v. N. E. R'y Co.*, 609

See ACT OF GOD, 1.

REAL ESTATE—See CLAIM, 2.

RECEIVER.

1. *Receiver during period of redemption.*—The complaint stated that at a foreclosure sale plaintiff purchased an undivided one third interest in a tract of mining ground; that the mortgagor was in possession and insolvent, and in connection with the owners of the other interests was working the claim and taking the proceeds; that before the expiration of the period of redemption the claim would be worked out and its value destroyed; and prayed judgment for the amount already received by the debtor since the sale, and that during the period of redemption a receiver be appointed to take charge of the proceeds. *Held*, that on the facts stated plaintiff was entitled to the relief sought, and that an order sustaining a general demurrer to the complaint was erroneous. *Hill v. Taylor*, 568

2. *Mining by receiver preferable to restraining as waste.*—The extraction of gold from mines is something more than the ordinary use of real estate by one in possession, and requires more than the ordinary remedies to protect the rights of a purchaser at judicial sale, during the period for redemption. It constitutes a waste or destruction of the property itself, and might be restrained; but the appointment of a receiver is preferable, as this allows the continuous working of the claims. *Id.*

3. *No receiver in a doubtful case.*—The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion. The court must be convinced that it is needful and the appropriate means to a proper end. It is a strong measure and cannot be exercised doubtfully. *Chicago Co. v. U. S. Co.*, 571

4. *No receiver to oust lessee.*—Where a party has title and possession under a lease in writing, enjoying rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. The plaintiff must show a clear right or a *prima facie* right, with such

RECEIVER. *Continued.*

circumstances of danger or probable loss as will move the conscience of a chancellor to interfere. *Id.*

5. *No receiver to aid forfeiture.*—The court declines to appoint a receiver to hold leased property pending the landlord's efforts to enforce an unconscionable and doubtful forfeiture. *Id.*

6. *A receiver of a mine* ought not to be appointed in a case which would involve a stoppage of the work, where neither insolvency nor mismanagement are charged against the defendants. *Carter v. Hoke*, 579

7. *Personal liability continuing after appointment of receiver.*—Where plaintiffs agree to furnish ore daily to a furnace during a certain period, and while furnishing such ore a receiver was appointed for the firm owning the furnace, at the instance and for the benefit of one of the members of the furnace company, it was *held*, that the original contracting parties continued liable for the ore furnished to the receiver. *Curtis v. Munford*, 585

8. *The appointment of a receiver in one State* does not operate to pass title to such receiver in property of the corporation situated in another State; and either its creditors or the corporation itself can dispose of such property unaffected by the appointment of such receiver. *Simpkins v. Smith & P. Co.*, 589

9. *Appointment of receiver of colliery, pending suit to rescind.*—In a suit by the purchaser of a coal mine to rescind the contract on the ground of fraud, it being essential that the mine should be kept in a going state, the court, upon the application of the purchaser, who was in possession of the colliery, appointed a receiver and manager until the hearing. *Gibbs v. David*, 591

10. *Receivership preferred to injunction.*—In controversies concerning the right to mines, involving separate titles, or between tenants in common, it is the settled doctrine in North Carolina that the working of mines ought not to be stopped, and the method adopted is the appointment of a receiver to secure the mines and profits. *Parker v. Parker*, 596

11. *Receiver not prayed for.*—In a proper case a receiver may be appointed where the application of the plaintiff was for an injunction. *Id.*

12. *Receiver pending ejectment.*—A court of equity will not appoint a receiver to take charge of oil property pending an action of ejectment therefor. *Enterprise Co.'s App.*, 599

RECORD.

1. *Omission in record—How supplied.*—Under the California practice, a deed referred to in the statement filed on motion for new trial, but not embodied therein, may be annexed thereto by appellants, accompanied with a certificate of the judge who tried the case that it is the deed mentioned in the statement and in his judgment denying the motion, and may thereafter be printed as part of the transcript of the record. *Hess v. Winder*, 218

2. *Act of May 10, 1872, as affecting proof of record and of possession.*—The act of Congress of May 10, 1872, § 5, gives no greater effect to the record of a mining claim than is given to the registration laws of the

RECORD. *Continued.*

States, and they have never been held to exclude parol proof of actual possession, and of its extent as *prima facie* evidence of title; nor will the want of such record exclude such proof. *Campbell v. Rankin*, 257

3. *Record as evidence of custom to record claims.*—Where the plaintiffs' title to a quartz mining claim depended upon an alleged custom to record quartz claims in the office of the recorder of the county, the record from such office is admissible to show the fact of plaintiffs' claim having been recorded, and as tending to prove the existence of the custom. *Pralus v. Pacific Co.*, 478

4. *Record excluded where not required by law.*—In ejectment for placer miner ground the plaintiff offered to prove that they had made a record. *Held*, that the statute of Montana requiring the record of "any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits," can not be construed to include a placer mine; that the record was therefore no link in the chain of title and hence not competent to be proved. *Moxon v. Wilkinson*, 602

5. *The record books of a mining district are admissible in evidence as tending to prove affirmatively the existence of a local custom making the recording of claims obligatory.* *Flaherty v. Gwinn*, 606

See DIST. RULES; LOCATION CERT., 1.

RELATION.

1. *Receiver's receipt as evidence—Relation—Town site title against mining location.*—In an action of trespass brought by the plaintiff as claimant of a certain town lot, against the defendant, using the same premises as a dump and as a part of his location of a ledge, where the plaintiff had, after the trespass, obtained a receiver's receipt from the land office for the price of certain land pre-empted, including the premises. *Held*, that such receiver's receipt related back to the time of filing the declaratory statement, and should have been received as evidence, although the trespass had been committed before the issue of such receiver's receipt. *Courchaine v. Bullion Co.*, 235

See RE-LOCATION, 1.

RELEASE.

1. *Release by one out of several defrauded.*—When one of three parties injured by the fraud of defendant has released his claim for damages, a right of action remains to the other two, who may sue in their own names. *Woodbury v. Deloss*, 144

2. *Release by landlord of right to damages does not affect right of tenant.*—The fact that the landlord, after suit commenced by the tenant, released all his right under his contract with the railroad company, would not affect the right of the tenant, but would reduce that portion of the verdict which in the apportionment by the jury was allowed to the landlord. *Mine Hill Co. v. Lippincott*, 555

See RAILROADS, 13.

RE-LOCATION.

1. *Possessory Act of 1852—Amended location not retroactive.*—An affidavit made under the Possessory Act of 1852, made with a view of se-

RE-LOCATION. *Continued.*

curing a possessory right to a certain piece of land, which fails to describe a portion of the premises designed to be covered, can not be cured by a subsequent affidavit correctly describing the premises, if intervening rights have accrued, notwithstanding the boundaries were correctly marked with stakes in the first instance. The second affidavit must be treated as an original proceeding. *Hawthurst v. Lander*, 214

2. *Re-entry of original owner before the re-locator perfects his re-location.*—If A has failed to do his annual labor, and B thereupon enters to re-locate, and proceeds so far as to put a notice on a stake at the discovery, but before he has marked the boundaries and otherwise completed the re-location A re-enters and re-unes labor in *good faith*. A saves his location and renders null the prior acts of the re-locator. *Gonu v. Russell*, 630

RENTS AND ROYALTIES.

1. *A covenant to mine without delay* which is broken by a *fraudulent delay*; allows of the interposition of a court of chancery. *Green v. Sparrow*, 635

2. *Fraud, to reduce conditional rent.*—Where the lessee of a colliery under covenant to pay a rent commencing the first quarter day after he had digged 1,000 stacks of coal, and to dig such coal without delay, etc., commenced work and dug that amount "wanting only a small quantity," and then employed his workmen in other works until the approaching quarter day had elapsed, with the expressed intent of saving the rent of one quarter. *Held*, that such fraudulent contrivance should not defeat the running of the rent from the first quarter day thus elapsed. *Id.*

3. *Construction of lease on royalties payable quarterly.*—Lessees were under covenant to pay a certain royalty quarterly; and if the royalty fell short they were to make it good up to a certain sum at the end of each quarter so that it should amount to at least £150 annually. *Held*, that an excess of royalty paid on the first quarters could not be made to offset a deficit in the succeeding quarters. *Bishop v. Goodwin*, 637

4. *Lease—"Consideration money" treated as rent.*—In a mining lease, besides an annual surface rent, certain sums payable half yearly, described as "further consideration money," and depending upon the rate of working the mines, were reserved to the lessor, his heirs and assigns. *Held*, on the death of the lessor intestate, that these sums were not purchase money passing to the personal representative of the lessor, but in the nature of rent, and therefore passed to the heir as incident to the reversion. *Barrs v. Lea*, 646

5. *Royalty must be in marketable condition—Duty of tenant to provide a coal breaker.*—Where a tenant rents a coal mine, and is to pay the lessor the rent in coal at specified prices, in the absence of any special agreement as to the condition in which the coal is to be delivered, it is the usage for the tenant to provide the coal breaker, and his duty to deliver it in a marketable condition; and if not so delivered, the expense necessarily incurred by the landlord in preparing it for market may be charged by him to the tenant. *Audenried v. Woodward*, 641

6. *Instalment payments for minerals treated as rent.*—A testatrix

RENTS AND ROYALTIES. *Continued.*

demised the minerals under certain lands in consideration of a surface rent, and of a sum of £5.039 1s. 3d., to be paid by half-yearly instalments, at the rate of £750 per acre for such part of the minerals as should be gotten by the lessees, until the whole sum was completely paid, with powers of distress and re-entry in default of payment. At the death of the testatrix one instalment was due and unpaid. *Held*, that it was in the nature of rent, and passed under a residuary bequest in favor of charities.

Brook v. Badley,

649

7. *Use and occupation of placer claim—Implied promise to pay rental.*—In an action to recover the value of the use and occupation of certain placer mining claims it was *held*: Where one contemplates entering into possession of the lands of another to occupy for use, and is informed by the lessor that he can do so upon terms stated, or for a reasonable compensation, and the party thereafter makes entry, and occupies and uses the lands, it is a good acceptance of the terms proposed and he will become thereby bound under an implied contract to pay the sum named; or if no sum is named, then such price as the use was reasonably worth.

Dickson v. Moffat,

666

8. *Rent and yearly value not synonymous.*—The penalty intended in the statute 4 Geo. II, Ch. 28, is double the "yearly value" of the lands detained, and not double rent. *Cross v. McClenahan,*

669

REPLEVIN.

1. *Replevin of slate from adverse occupant of quarry.*—Replevin does not lie by one not in the actual, exclusive possession of land, whatever title he may claim, against one who is in the actual, visible, notorious occupation and possession thereof, claiming the right, for slates taken out of the quarry on the land. *Brown v. Caldwell,*

674

2. *Second replevin irregular.*—Where DeWitt had replevied 350 tons of iron ore, which Morris caused to be seized on a second writ of replevin, such second writ was quashed on motion, and the court refused to hear affidavits of ownership filed by the party suing out the second writ.

Morris v. DeWitt,

680

3. *No replevin for ore unbroken.*—Action of replevin for specific quantity of mineral ore can not be commenced until such mineral has been converted from real into personal property, by being severed from the earth. *Knoultton v. Culver,*

682

4. *Evidence of intent in taking.*—In an action of replevin for lead ore, evidence as to the intent of the defendant in taking and appropriating the property is immaterial and inadmissible, as his liability does not depend upon the *quo animo* which characterized the taking or conversion.

Ecker v. Moore,

685

5. *Title to land can not be tried,* but may incidentally arise and be heard in a transitory action. *Green v. Ashland Co.,*

692

6. *The mere assertion of title is nothing* if the title be not in fact in controversy; but when it appears that there is necessitated a trial of title to land in order to determine the right to the chattel, replevin will not lie. *Id.*

7. *Ore, to which soil adheres, may be replevied.*—In an action of re-

REPLEVIN. *Continued.*

plevin for ore raised from a mine by the plaintiffs, the fact that the ore was unwashed, and was mixed with earth, would not affect the plaintiffs' right of action. *Id.*

RES ADJUDICATA.

1. *Parol evidence as to issues decided on first trial.*—A judgment is conclusive of every issue decided in the suit, and in a second suit between the same parties, it can be shown by parol evidence what was tried in the first, whenever it becomes necessary to do so. *Campbell v. Rankin*, 257

2. *Mesne profits—Estoppel of judgment in ejectment.*—The verdict and judgment in the ejectment are conclusive of the plaintiffs' right to recover the mesne profits only from the time the action of ejectment commenced down to the execution of the *habere facias*, and where they claimed mesne profits prior to the time of bringing their suit in ejectment, they opened the question of their title and of the possession of defendants for such prior time, and neither the judgment in ejectment nor any of the proceedings therein estopped the defendants from having their rights again passed upon, or the same evidence again submitted to a jury. *Kille v. Ege*, 654

RESCISSION.

1. *Offer to return deed—Issues unchanged by amendment.*—An averment in such complaint of an offer to return the deed, is not an averment of a rescission of the contract, nor an offer to rescind; nor does an amendment striking out the offer to return the deed change the issues tendered in the complaint. *Ahrens v. Adler*, 114

2. *Effect of offer to return deed.*—An offer to return a deed does not re-invest the grantor with the title, nor is it a rescission of the contract by the grantee, nor an offer to rescind. *Id.*

3. *No delay allowed to rescindor.*—In suits to rescind contracts for fraud, particularly where the subject is of variable value, it is the duty of the plaintiff to put forward his complaint at the earliest period. *Jennings v. Broughton*, 405

4. *Discretion to cancel instrument.*—A chancellor will not always order an instrument to be delivered up to be canceled when he would refuse specific performance of the contract; he may leave the parties to their legal remedies. To decree an instrument to be delivered up to be canceled is a matter in the sound discretion of the court, and the power should not be exercised except in a very clear case. *Stewart's Appeal*, 491

See RECEIVER, 9.

RESERVATION—See PATENT, 3.

SALE—See BILLS AND NOTES, 4; LEASE, 11.

SALINES.

1. *Salines reserved by the United States—General policy of government.*—The policy of the government since the acquisition of the northwest territory and the inauguration of our land system, to reserve

SALINES. *Continued.*

salt springs from sale, has been uniform. This policy has been applied to the Louisiana territory, acquired from France in 1803, and probably would apply to Nebraska without the act of July 22, 1854; but under that act it applies, at least so far as to render void an entry where the salines, at the time, had been noted on the field books, were palpable to the eye, and were not first discovered after entry. *Morton v. State*, 451

See PATENT, 3.

SPECIFIC PERFORMANCE.

1. *Specific performance, when not discretionary.*—When a contract for the sale of land is in writing, fair in all its parts, certain and for an adequate consideration, its specific performance becomes a matter of course; it ceases to be discretionary. *North Georgia Co. v. Latimer*, 367

See PROS. CONT., 34.

STATUTES.

1. *Repugnant statutes.*—When two statutes of different dates are repugnant, the latter repeals the former to the extent of such repugnancy. *Union Iron Co. v. Pierce*, 20

2. *Repeal—Effect on pending suits.*—Actions on statutes in their nature penal, pending at the time of the repeal of such statutes, can not be further prosecuted after such repeal. *Id.*

3. *Acts concerning the same subject, passed at the same time, should if possible receive such construction as will give effect to both.* *Lorimier v. Lewis*, 457

See CONSTITUTION, 1; PARTIES, 4.

STATUTE OF FRAUDS—See PROS. CONT., 24.

STATUTE OF LIMITATIONS.

1. *Title to personality by limitation.*—In order that the title to personality may pass by the Statute of Limitations, there must be some act of dominion over it inconsistent with the right of the original owner, asserted by the party claiming the benefit of the statute. *Baker v. Chase*, 66

2. *Amendment as affecting Statute of Limitation.*—The plaintiff was allowed to amend his declaration so as to change the form of action from assumpsit to tort. The cause of action accrued more than six years before the amendment, but not before the bringing of the suit. *Held*, that the cause of action remaining unchanged, the Statute of Limitation was not a bar; otherwise, had the cause of action been changed. *Smith v. Bellows*, 157

3. *Title by the Statute of Limitations* is not available to a defendant failing to plead the same. *Maine Boys' T. Co. v. Boston Co.*, 247

4. *Date of commencement of action when new parties have been substituted.*—In an action for mesne profits none of the plaintiffs were originally parties to the action of ejectment, the record of which they gave in evidence, but were added two years after the writ issued. The original plaintiffs had no title and were nonsuited. The new plaintiffs did not derive title from the original plaintiffs, but recovered on their own. There was no privity of interest or title between them, and their

STATUTE OF LIMITATIONS. *Continued.*

names had not been omitted through mistake. *Held*, that although the plaintiffs had been added without objection, yet they thereby acquired no rights relating back of their admission, and the action commenced as to them when their names were put on the record. *Kille v. Ege*, 654
See RAILROADS, 14.

STOCK.

1. *Stock paid for with property*.—Unless prohibited by statute, an agreement between the incorporators of a company and the directors, by which the former convey to the company, property needed for the purpose of its operations, and receive payment therefor in full-paid shares of the stock of the company, is, in the absence of fraud, binding upon the parties, and such stock is full-paid stock. *Phelan v. Hazard*, 41

2. *Impeachment by creditor of mode of paying for stock*.—Whether subsequent creditors of the company can impeach such transaction as respects shares of stock which purport to be full-paid shares, when they are in the hands of a subsequent registered transferee for value, who purchased the same as full-paid shares, relying upon the certificates and the records of the corporation that full payment therefor had been received by the company, *quære*. *Id.*

3. *Voting stock transferred by unregistered indorsement*.—Under a statute which provides that except as between the parties the transfer of stock shall not be valid until the same shall have been entered on the books of the corporation, a stockholder may vote stock which was originally issued to him, although transferred by indorsement and delivery to a friend, if such transfer had not been entered on the books of the company, and the certificate had been returned to him prior to the meeting of the stockholders. *State v. Pettineli*, 513

See PERSONAL LIABILITY; POSSESSION. 6.

SURFACE.

1. *Owner of minerals entitled to working surface*.—One who has the exclusive right to mine coal upon land is entitled, even as against the owner of the soil, and so certainly against an intruder, to the possession of the land so far as it is necessary for such purpose. If the portion needed does not appear upon the trial, the court will presume as against a mere intruder that the entire premises are required. *Turner v. Reynolds*, 191

SURFACE SUPPORT.

1. *Removal of coal pillars*.—Where a lessee is bound to take out all the coal, he has the right to remove the pillars usually left for support. *Mine Hill Co. v. Lippincott*, 555
See RAILROADS, 1.

TENANT IN COMMON—See PARTITION, 1-3; QUIET TITLE 9, 10.

TENDER—See RAILROADS, 5; RESCISSION, 1, 2.

TIME.

1. *Fractions of day will not in general be considered*, and the *prim facie* presumption is that the several acts in the course of legal proceed-

TIME: *Continued.*

ing, when done on the same day, were performed in the order necessary to give them legal effect. But whenever an inquiry into the priority of such acts becomes necessary to protect the rights of parties, the ordinary presumption must give way to the facts of the case. *Knowlton v. Culcer*, 682

See ABANDONMENT, 1; PROS. CONT., 9.

TOWN SITE.

1. *Miner's need of lot a question of fact.*—Whether a town lot included within the boundaries of a mining claim is so necessary to the mine owner in the working of his mine as to make his right to the lot, under the act of Congress of July 1, 1864, superior to that of an earlier pre-emptor of the lot, is a question for the jury. *Courchaine v. Bullion Co.*, 236

See RELATION, 1.

TRESPASS.

1. *Act legalizing trespass strictly construed.*—The occupant of land may, in every case, rely upon his possession as against a mere trespasser. In permitting persons to go upon public lands occupied by others, for the purpose of mining, the legislature has legalized what would otherwise have been a trespass, and the act can not be extended by implication to a class of cases not specially provided for. *Fitzgerald v. Urton*, 198

See MEASURE OF DAMAGES, 3; PLEADING AND PRACTICE, 3.

VARIANCE.

1. *If the plaintiff has not declared for money paid to the use of the defendant, he can not have an action therefor.* *Murley v. Ennis*, 360

See EJECTMENT, C.

VENDOR AND PURCHASER.

1. *Innocent purchaser without notice.*—The defense that a defendant is an innocent purchaser for valuable consideration without notice, may be set up either by plea or by answer. The distinction stated between answer and plea in such case. *Carter v. Hoke*, 579

2. *Idem—Burden of proof.*—Upon such defense, after defendant proves the consideration paid, the plaintiff must show, if he can, that there was notice. *Id.*

See FRAUD, 3, 4; RESCISSION.

VENDOR'S LIEN.

1. *Vendor's lien not transferable.*—The equitable lien held by the vendor of real estate, after absolute conveyance thereof, is not subject to levy and sale on execution, nor is it the subject of private transfer. *Ross v. Heintzen*, 483

2. *Idem—The purchase money attachable.*—The debt of unpaid purchase money may be levied upon or transferred; but the equitable interest that attaches to the property conveyed by virtue of the indebtedness in hands of the vendor, is extinguished by a transfer of the indebtedness. *Id.*

VERDICT—See PLEADING AND PRACTICE, 14, 21.

VESTED RIGHTS—See CLAIM, 3; PUBLIC DOMAIN, 8.

WAGES—See PARTNER, 4.

WARRANTY—See CONSIDERATION, 3.

WASTE—See LEASE, 3.

WATER.

1. *Complaint for diversion of water.*—A complaint alleging that plaintiffs are the owners and in possession of certain mining claims, on a certain stream, and are entitled to the natural flow of the waters of the stream, which had been diverted to their injury by defendants, set forth a sufficient cause of action. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof. *Leigh Co. v. Independent Co.*, 97

WAY—See RAILROADS, 3.

WITNESS.

1. *Interested witness—Stock sold after suit brought.*—One who sells out his shares in an incorporated company after suit is commenced against the corporation, can not testify on behalf of the company, because of his liability for costs; but his competency could be restored by the payment of the costs in addition to the transfer of his stock. *Mokelumne Co. v. Woodbury*, 6

2. *Interest of witness.*—A witness in an action for a disputed mining claim, who was in the employ of the party in possession at fixed wages, to be paid, however, from the proceeds of the claim, is not incompetent when his wages are not dependent upon the sufficiency of such proceeds. *Live Yankee Co. v. Oregon Co.*, 94

3. *Interest of witness in ejectment.*—In ejectment for mining claims and for damages for gold extracted therefrom, a witness for plaintiffs stated on his *voir dire* that he was an owner in the claims during the time the alleged damages occurred, but had sold to some of the plaintiffs; defendants objected to witness, on the ground of interest and incompetency. Before the question was passed upon, the plaintiffs obtained leave to strike their claim for damages. *Held*, that the objection to the witness was properly overruled. *Grady v. Early*, 104

4. *Executor as a witness for his testator's grantees.*—The executor of plaintiffs' grantor is a competent witness for plaintiffs in ejectment for the granted premises, even though the material part of the assets of the estate consist of the plaintiffs' bond for the purchase money, one of whom had declared to the executor that in case of failure to recover in the suit he would endeavor to get an abatement of the purchase money. His interest in the matter was too remote to affect his competency as a witness. *Turner v. Reynolds*, 190

5. *Interested witness—Decease of one of opposite party.*—In a case arising out of a contract, signed by A, of the one part, and by B, C, D, E and F, of the other part, all being present and engaged in fixing the terms, A is not an incompetent witness because one of the parties of the other part has since died. *North Ga. Co. v. Latimer*, 367

6. *Testimony of party in interest under statute.*—If upon notice from the plaintiffs served on one of the defendants that they wished to have all the defendants sworn as witnesses on the trial, two of the defendants appear and testify, but the third does not, the plaintiffs have no right under the statute, 1841, p. 26, to be sworn and testify in their own behalf. Because the third defendant, not served, does not appear and testify. *Ecker v. Moore*, 686

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